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# When the Commerce Clause Goes International: A Proposed Legal Framework for the Foreign Commerce Clause

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# WHEN THE COMMERCE CLAUSE GOES INTERNATIONAL: A PROPOSED LEGAL FRAMEWORK FOR THE FOREIGN COMMERCE CLAUSE

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## INTRODUCTION

The world is becoming a smaller place. Technology and the Internet have made global travel and communication easier, quicker, and more common. Novel legal issues arise every day to deal with this modern interconnected world. How does the law address these new problems?

Congress is allowed "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[1] The scope of Congress's power to regulate commerce "among the several States" (the "Interstate Commerce Clause") has long been debated.[2] In the modern world of global interaction, Congress's power to regulate commerce "with foreign Nations" (the "Foreign Commerce Clause") may soon take center-stage.[3] The U.S. Supreme Court, however, has not yet articulated a legal framework for the Foreign Commerce Clause. This lack of guidance has lead to circuit splits and confusion as to the scope of this power.[4]

This legal issue has recently surfaced in the context of the PROTECT Act, a statute with extraterritorial application that prohibits U.S. citizens from molesting children abroad.[5] Does the Foreign

1. U.S. CONST. art. I, § 8, cl. 3.

2. *Id.*; *see also infra* Section II.A (discussing the legal framework of the Interstate Commerce Clause).

3. U.S. CONST. ART I, § 8, cl. 3.

4. *See infra* Section II.B (discussing the current legal landscape of the Foreign Commerce Clause).

5. Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today

Commerce Clause give Congress plenary power to make it a crime for a U.S. citizen to engage in child sex tourism in Cambodia? How about robbing a bank in Spain? What about for far less offensive conduct, such as littering in France? Indeed, can this be taken to the extreme so that under the foreign commerce power Congress can prohibit a U.S. citizen from eating pasta in Italy? How about conduct by non-U.S citizens or other countries? Can Congress make it a crime for a non-U.S. citizen to engage in child sex tourism in Cambodia? Can Congress require Mexico to enact an embargo of Cuban cigars? Set forth in the chart below are four categories of hypotheticals which challenge the scope of Congress's power under the Foreign Commerce Clause:

| | ***Conduct by a Nation*** | ***Conduct by an Individual in a Foreign Nation*** |
|---|---|---|
| ***U.S. Actor*** | **(1) Statutes regulating conduct in the United States**<br><br>*Hypo: Under the Foreign Commerce Clause, can Congress enact an embargo of Cuban cigars?* | **(3) Extraterritorial statutes regulating conduct of U.S. citizens in foreign nations**<br><br>*Hypo: Under the Foreign Commerce Clause, can Congress enact a law that subjects a U.S. citizen to criminal prosecution if they molest children in Cambodia?*<br>•*Or if they rob a bank in Spain?*<br>•*Or if they litter in France?* |
| ***Non-U.S. Actor*** | **(2) Extraterritorial statutes regulating conduct of foreign nations**<br><br>*Hypo: Under the Foreign Commerce Clause, can Congress pass a law requiring Mexico to enact an embargo of Cuban cigars?* | **(4) Extraterritorial statutes regulating conduct of non-U.S. citizens in foreign nations**<br><br>*Hypo: Under the Foreign Commerce Clause, can Congress pass a law prohibiting a Cambodian citizen from molesting a child in Cambodia?* |

All of these hypotheticals raise one important question: What connection, if any, must the conduct have to the United States in order

Act ("the PROTECT Act"), 18 U.S.C. § 2423 (2006).

for it to fall within the scope of the Foreign Commerce Clause? Lower courts are in disarray in how to answer this question.[6] The purpose of this Article is to set forth a practical and comprehensive legal framework for the Foreign Commerce Clause that could be applied to these different situations and to the myriad of other current federal laws with extraterritorial application.[7] This is the first Article to contemplate a distinct legal framework in light of international legal principles and in light of the history, jurisprudence, and text of the Foreign Commerce Clause.[8]

The first part of this Article considers whether, under international law, Congress can pass laws with extraterritorial reach. The answer is clear—under the nationality jurisdictional principle, international norms allow Congress to regulate the conduct of U.S. citizens in other countries. This answer, however, is just the start to the analysis. The rest of the Article considers what limits, if any, Congress has under the Foreign Commerce Clause in enacting such laws.

The second part of this Article analyzes three possible ways to interpret the Foreign Commerce Clause. First, the Interstate and Foreign Commerce Clauses share the same text in the Constitution.[9] It could, therefore, be argued that both Clauses should be interpreted the same and that the same legal framework should apply. The federalism and state sovereignty issues raised by the complex Interstate Commerce Clause jurisprudence, however, do not arise in the context of the Foreign Commerce Clause. Thus, there is no reason to simply superimpose the legal framework of the Interstate Commerce Clause onto the Foreign Commerce Clause without thought. Yet, as discussed in the second section, this is precisely what a majority of lower courts have done. In doing so, these courts have ignored the distinct history and underlying concerns embedded in the Foreign Commerce Clause. A few lower courts have recognized a distinction, but have adopted a "tenable nexus" test[10] that might give Congress unfettered power to regulate conduct abroad without any apparent limits. As noted in the third section, while many lower courts have adopted the legal framework of the Interstate Commerce Clause, no court has superimposed the legal framework of the Indian Commerce Clause onto the Foreign Commerce Clause. Courts have not done so because they

6. *See infra* Section II.B (discussing the circuit splits and confusion on the legal framework of the Foreign Commerce Clause).

7. *See, e.g.*, *infra* Appendix A (listing hundreds of federal laws with potential extraterritorial application).

8. *See infra* notes 45, 48 and accompanying text (distinguishing other articles which have considered Foreign Commerce Clause issues).

9. U.S. CONST. art. I, § 8, cl. 3.

10. *See infra* Section II.B (discussing the "tenable nexus" test).

recognize the distinct relationship the federal government has with Indian tribes. Since the legal frameworks for the Interstate and Indian Commerce Clauses reflect the distinct and unique relationships between the relevant entities, then, by analogy, a legal framework for the Foreign Commerce Clause should reflect the distinct relationship the federal government has with foreign nations.

The third part of this Article considers the parameters of this distinct relationship between the United States and foreign nations. As a matter of first principles, any proposed legal framework should constrain Congress's foreign commerce power, while recognizing that the power has been historically very broad (even broader than Congress's interstate commerce power) so that the United States can speak with one voice in foreign matters. These constraints might best be determined by the text of the Foreign Commerce Clause, which limits Congress's power to "regulate Commerce with foreign Nations."[11] Prominent scholars have debated the meaning of "[t]o regulate Commerce."[12] Instead of joining this debate, this Article simply takes the position that whatever this phrase means, it may impose some limits on Congress's foreign commerce power. The foreign commerce power is further limited by the phrase "*with* foreign Nations" (notably distinct from the phrase "*among* the several States").[13] The term "with" is crucial. As suggested by cases where courts have, as a matter of statutory interpretation, determined the scope of federal jurisdiction over extraterritorial conduct, there has to be some "connection" between the United States and the foreign country.

The next section contemplates what factors this "connection" entails. These factors consider that the conduct have both some impact on the United States and some territorial nexus to the United States. These factors also consider Congress's intent to use its foreign commerce power under the presumption that any regulation with extraterritorial reach should respect international norms such as the sovereignty of foreign nations. The last section of the Article applies this distinct legal framework to the hypothetical laws set forth in the above chart in a way that is meant to be practical and reflective of the history and text of the Foreign Commerce Clause.

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11. U.S. CONST. art. I, § 8, cl. 3.

12. *Id.*; *see also infra* Subsection III.C.1 (discussing the scholarly debate on the meaning of "[t]o regulate Commerce").

13. U.S. CONST. art. I, § 8, cl. 3 (emphasis added); *see also infra* Subsection III.C.2 (analyzing the meaning of "with foreign Nations").

## I. FEDERAL LAWS THAT GOVERN U.S. CITIZENS' CONDUCT ABROAD

There are potentially hundreds of federal laws that give Congress the power to regulate the conduct of U.S. citizens abroad, both in the civil and criminal context.[14] Some of those laws explicitly provide for extraterritorial application, while others define "commerce" so broadly that it implicitly encompasses foreign commerce. Set forth in Appendix A of this Article is a chart listing federal laws with extraterritorial application. For example, under Title 15, which concerns trademarks, commerce is defined to include "*all* commerce which may lawfully be regulated by Congress."[15] "[A]ll commerce" is such a broad definition that it necessarily encompasses foreign commerce. On the criminal front, there are over 300 federal statutes that have potential extraterritorial application.[16] Such crimes include: (1) homicide, kidnapping, assault, sex crimes, and terrorism; (2) property destruction; and (3) threats, false statements, theft, and counterfeiting.[17] Some of these criminal laws, like the statute criminalizing genocide,[18] implicate conduct covered by treaty obligations. But others—like the PROTECT Act, which makes it illegal for U.S. citizens to molest children abroad—expressly rely on Congress's Foreign Commerce Clause power. [19]

Laws with extraterritorial application raise two issues. First, under international laws, are nations allowed to enact laws that regulate the conduct of their citizens in other countries? The short answer is "yes" - nations are allowed to enact reasonable laws with extraterritorial application.[20] This conclusion, however, is only the start of the analysis. The second issue, and the focus of this Article, is whether the Constitution, and in particular the Foreign Commerce Clause, gives Congress the power to enact such laws. The next two sections consider each of these issues.

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14. *See, e.g.*, *infra* Appendix A (listing federal laws with possible extraterritorial reach).

15. 15 U.S.C. § 1127 (2006) (emphasis added).

16. *See, e.g.*, *infra* Appendix A; *see also* CHARLES DOYLE, CONG. RESEARCH SERV., 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL Law 40–63 (2012), [hereinafter *CRS Report*], *available at* http://www.fas.org/sgp/crs/misc/94-166.pdf (listing a number of federal criminal laws subject to extraterritorial application).

17. *See, e.g.*, *infra* Appendix A.

18. 18 U.S.C. § 1091 (2006) (making it a crime for a U.S. national to commit genocide abroad in accordance with the U.S. ratification of the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, S. EXEC. DOC. O, 81-1 (1949), 78 U.N.T.S. 277).

19. 18 U.S.C. § 2423(b)–(c) (2006) (making it a crime for a U.S. citizen who "travels in foreign commerce" to molest a child).

20. *See infra* Section I.A.

### A. *Permissible Under International Law*

At the outset, it is important to note that international law is only persuasive authority.[21] Therefore, unless Congress has expressly codified the law, United States courts are not bound by international law. Nevertheless, courts presume that Congress intends to enact statutes within the bounds of international law.[22]

International law provides several jurisdictional principles under which a nation may extraterritorially apply a statute. The common classification of jurisdiction relies on five principles: (1) the territorial principle which allows for jurisdiction over conduct either within or having "detrimental effects" in the United States; (2) the active nationality principle which allows for jurisdiction based on the nationality of the offender; (3) the passive personality principle which allows for jurisdiction based on the nationality of the victim; (4) the protective principle which allows for jurisdiction over "foreigners for [] act[s] committed outside the United States that may impinge on the territorial integrity, security, or political independence of the United States"; and (5) the universality principle which provides jurisdiction over extraterritorial acts for crimes so heinous as to be universally condemned.[23]

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21. *See, e.g.*, Medellin v. Texas, 552 U.S. 491, 504–06 (2008) (finding that International Court of Justice laws did not create domestically enforceable law); United States v. Yousef, 327 F.3d 56, 86 (2d Cir. 2003) ("[I]n fashioning the reach of our criminal law [to apply to overseas conduct], 'Congress is not bound by international law.' 'If it chooses to do so, it may legislate with respect to conduct outside the United States, in excess of the limits posed by international law.'") (citations omitted); United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991) ("Our duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law."); United States v. Davis, 905 F.2d 245, 248 n.1 (9th Cir. 1990) ("International law principles, standing on their own, do not create substantive rights or affirmative defenses for litigants in United States courts." (citing United States v. Thomas, 893 F.2d 1066, 1068–69 (9th Cir. 1990))); RONALD C. SLYE, BETH VAN SCHAACK, INTERNATIONAL CRIMINAL LAW 104 (Vicki Been et al. eds., 2009) ("[T]he resolutions, declarations, statements, and records of multilateral bodies—such as the UN General Assembly, the International Law Commission, and the Committee Against Torture . . . are recommendatory.").

22. *See, e.g.*, Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (explaining that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); *Yousef*, 327 F.3d at 86 ("In determining whether Congress intended a federal statute to apply to overseas conduct, 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.'") (citations omitted); *Thomas*, 893 F.2d at 1069 ("Although Congress is not bound by international law in enacting statutes, out of respect for other nations, courts should not unnecessarily construe a congressional statute in a way that violates international law.") (citations omitted).

23. *See* United States v. Vasquez-Velasco, 15 F.3d 833, 840 & n.5 (9th Cir. 1994) (citing 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF LAW OF THE UNITED STATES § 402 cmt. a (1987) [hereinafter *Restatement*]). Harvard Research in International Law first articulated these

Of these jurisdictional principles, the second principle, active nationality, explicitly allows nations to regulate the conduct of their citizens within other nations. While some of these jurisdictional principles are controversial,[24] the active nationality principle is almost "universally accepted."[25] U.S. courts have applied this principle to laws with extraterritorial application "based upon the allegiance" that U.S. citizens "owe" to the "country and its laws."[26]

Importantly, the exercise of jurisdiction under any of these principles has to be reasonable.[27] There are a number of factors that courts consider when determining reasonableness, including "the link of the activity" and "the connections, such as nationality, residence, or economic activity."[28] Many U.S. courts have found the active nationality principle as a reasonable exercise of jurisdiction to uphold federal laws with extraterritorial reach.[29] Thus, under international law

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five principles in a study.. *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 445 (Supp. 1935) [hereinafter *Harvard Study*]. "These principles are not mutually exclusive but may in fact overlap." United States v. Smith, 680 F.2d 255, 258 n.3 (1st Cir. 1982) (citation omitted); *see also CRS Report*, *supra* note 16, at 12–14 (noting that many courts rely on more than one jurisdictional principle to justify the extraterritorial application of federal laws).

24. Passive nationality principle (where the focus is on the nationality of the victim) and the universal principle are controversial. *See Harvard Study*, *supra* note 23, at 445 (explaining that the passive nationality principle is "contested" by some nations and the universal principle is "widely though by no means universally accepted"); *see also* Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 184 (2004) ("Universal jurisdiction can have dangerous consequences.").

25. *Harvard Study*, *supra* note 23, at 445.

26. United States v. King, 552 F.2d 833, 851 (9th Cir. 1976) (applying the active nationality principle to uphold criminal convictions based on conduct abroad); *see also* Blackmer v. United States, 284 U.S. 421, 436 (1932) (explaining that a U.S. citizen who lived abroad "continued to owe allegiance to the United States" and that "[b]y virtue of the obligations of citizenship, the United States retained its authority over him").

27. *Restatement*, *supra* note 23, § 403 cmt. a (explaining that "[t]he principle that an exercise of jurisdiction on one of the bases indicated . . . is nonetheless unlawful if it is unreasonable [a]s established in United States law, and has emerged as a principle of international law"). One commentator explained how courts apply the *Restatement*'s reasonableness requirement: "While the Restatement's views carry considerable weight with both Congress and the courts, the courts have traditionally ascertained the extent to which international law would recognize extraterritorial application of a particular law by citing the Harvard study principles, read expansively." *CRS Report*, *supra* note 16, at 12 (citation omitted).

28. *Restatement, supra* note 23, § 403(2).

29. *See, e.g.*, United States v. Frank, 599 F.3d 1221, 1233 (11th Cir. 2010) (upholding the extraterritorial reach of the PROTECT Act as a reasonable exercise of active nationality jurisdiction); United States v. Clark, 435 F.3d 1100, 1106 (9th Cir. 2006) (same); United States v. Martinez, 599 F. Supp. 2d 784, 797 (W.D. Tex. 2009) (same); *see also Blackmer*, 284 U.S. at 437 (upholding the conviction of a U.S. citizen living in Paris who ignored a subpoena explaining that "[w]ith respect to such an exercise of [extraterritorial jurisdiction], there is no question of international law"); United States v. Hill, 279 F.3d 731, 740 (9th Cir. 2002) (upholding criminal convictions of U.S. citizens who committed crimes in Mexico because the

there is little dispute that Congress can enact laws that regulate the conduct of U.S. citizens in other countries.[30]

### B. *Permissible Under the Foreign Commerce Clause?*

Given that international law allows for the United States to regulate the conduct of its citizens abroad, are there any limits? On the domestic front, courts have consistently held, on statutory-interpretation grounds, that Congress can enact laws that regulate the conduct of U.S. citizens abroad.[31] There are various constitutional provisions that might be relied upon to give Congress the power to enact laws with extraterritorial reach. For example, the Constitution gives Congress the power "[t]o define and punish . . . Felonies committed on the high Seas, and Offences against the Law of the Nations;"[32] and "[t]o make all Laws which shall be necessary and proper" to carry out the "foregoing Powers" (the "Necessary and Proper Clause").[33] Relying on these last two powers, courts have upheld the constitutionality of federal criminal laws with extraterritorial reach in the maritime context.[34] Courts have also relied on Congress's power under the Necessary and Proper clause along with other powers, such as the President's Foreign Affairs Power and Treaty-Making Power,[35] to uphold laws in the foreign affairs context.[36]

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active nationality principle "permits a country to apply its statutes to extraterritorial acts of its own nationals"); United States v. Walczak, 783 F.2d 852, 854 (9th Cir. 1986) (stating that the federal court system had jurisdiction over a U.S. citizen for a crime committed in Canada).

30. There are number of other countries that have enacted laws with extraterritorial application. For example, Germany, Japan, and Australia have all enacted laws, similar to the PROTECT Act, 18 U.S.C. § 2423, making it a crime for their citizens to engage in child sex tourism abroad. *Crimes (Child Sex Tourism) Amendment Act 1994* (Cth) (Austl.); STRAFGESETZBUCH [STGB] [PENAL CODE], Nov. 13, 1998, BUNDESGESETZBLATT, TEIL I [BGBL. I], as amended §§ 174–84 (Ger.); KEIHŌ [KEIHŌ] [Pen. C.] 1907, art. 3, 174–84.

31. *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813–14 (1993) (Scalia, J., dissenting) (dissenting on other grounds, Scalia explained "this Court has repeatedly upheld its power to make laws applicable to persons or activities beyond our territorial boundaries where United States interests are affected" (citing Ford v. United States, 273 U.S. 593, 621–23 (1927); United States v. Bowman, 260 U.S. 94, 98–99 (1922); Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909))).

32. U.S. CONST. art. I, § 8, cl. 10. Congress has primarily relied on this power to enact criminal legislation in the "maritime context." *CRS Report*, *supra* note 16, at 1.

33. U.S. CONST. art. I, § 8, cl. 18.

34. *See, e.g.*, United States v. Ibarguen-Mosquera, 634 F.3d 1370, 1378–79 (11th Cir. 2011) (noting that Congress has the power under clause 10 of the U.S. Constitution to enact the Drug Trafficking Vessel Interdiction Act, 18 U.S.C. § 2285 (2010)).

35. *See* U.S. CONST. art. II, § 2, cl. 1, 2 ("The President shall be Commander in Chief of the Army . . . . He shall have Power . . . to make Treaties . . . .").

36. *See, e.g.*, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 329 (1936) (upholding as constitutional Congress's delegation to the President of the authority to prohibit

The Constitution also allows Congress "[t]o regulate Commerce with foreign Nations,"[37] which is the power explicitly relied upon for the enactment of the PROTECT Act.[38] Congressional power under the Foreign Commerce Clause is crucial because it potentially fills a gap where the other powers do not reach. For example, Congress can only enact laws dealing with treaties, if such treaties exist.[39] Congress can only enact laws dealing with the "Law of Nations" if there is such an offense under international law.[40] Thus, because many federal laws with extraterritorial application implicate neither a treaty nor the "Law of the Nations,"[41] the Foreign Commerce Clause takes center stage.

Indeed, with rapid globalization and the increased application of U.S. laws with extraterritorial reach, courts are currently wrestling with Congress's foreign commerce power.[42] Unlike the Interstate Commerce Clause, which the U.S. Supreme Court and scores of lawyers and scholars have analyzed,[43] the Foreign Commerce Clause has only recently and aggressively garnered the attention of lower courts[44] and Congress.[45] Scholars have only just started addressing this issue.[46] The

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the sale of weapons to certain countries engaged in hostilities with each other under the foreign affairs power); United States v. Belfast, 611 F.3d 783, 805 (11th Cir. 2010) ("Congressional power to pass those laws that are necessary and proper to effectuate the enumerated powers of the Constitution is nowhere broader and more important than in the realm of foreign relations. . . . It follows generally that ' [i]f [a] treaty is valid there can be no dispute about the validity of [a] statue [passed] under Article I, Section 8, as a necessary and proper means to execute the powers of the Government.'" (alteration in original) (citations omitted)).

37. U.S. CONST. art. I, § 8, cl. 3.

38. 18 U.S.C. § 2423(b), (c) (2006) (explaining that the law covers "travels in foreign commerce").

39. *See* Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 952 (2010).

40. *See id.*; Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191, 1219–23 (2009).

41. *See, e.g.*, *infra* Appendix A.

42. *See infra* Section II.B (discussing the current legal landscape of the Foreign Commerce Clause).

43. *See, e.g.*, *infra* Section II.A (describing cases and scholarship dealing with the Interstate Commerce Clause).

44. *See infra* Section II.B (analyzing court cases dealing with the Foreign Commerce Clause).

45. For example, in February 2012 a report was made for Congress specifically concerning the extraterritorial reach of American criminal law. *CRS Report*, *supra* note 16.

46. The vast majority of scholarship written about the Foreign Commerce Clause focuses solely on the constitutionality of the PROTECT Act rather than on articulating a legal framework for how to analyze Foreign Commerce Clause issues. *See generally* Daniel Bolia, Comment, *Policing Americans Abroad: The PROTECT Act, the Case Against Michael Lewis Clark, and the Use of the Foreign Commerce Clause in an Increasingly Flat World*, 48 S. TEX. L. REV. 797 (2007) (arguing that Supreme Court precedent indicates that the PROTECT Act falls within the powers delegated to Congress through the Foreign Commerce Clause); Julie Buffington, Comment, *Taking the Ball and Running with It:* U.S. v. Clark *and Congress's*

U.S. Supreme Court has not yet articulated the extent of Congress's power under the Foreign Commerce Clause to enact laws with extraterritorial reach. Because of this lack of guidance, as discussed in the next section, lower courts are at a loss for how to analyze Foreign Commerce Clause issues. This confusion has resulted in circuit splits and even conflicts within the same circuits.[47] Lower courts, in fact, have shied away from addressing Foreign Commerce Clause issues. For example, one court specifically avoided ruling on the scope of Congress's foreign commerce power by reframing the issue as one of statutory interpretation.[48]

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*Unlimited Power Under the Foreign Commerce Clause*, 75 U. CIN. L. REV. 841 (2006) (asserting that judicial precedent provides little guidance to future courts concerned with determining whether statutes that regulate the activities of U.S. citizens traveling abroad pass constitutional muster, and that courts should turn to the principles established in *United States v. Lopez* when confronted with this issue); Jeff Christensen, Comment, *Congressional Power to Regulate Noncommercial Activity Overseas: Interstate Commerce Clause Precedent Indicates Constitutional Limitations on Foreign Commerce Clause Authority*, 81 WASH. L. REV. 621 (2006) (arguing that Congress's Foreign Commerce Clause Authority does not extend to noncommercial sexual abuse of minors overseas by U.S. citizens); Nicholas Christophilis, Case Comment, *Constitutional Law—Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003—Congress Did Not Exceed Its Constitutional Authority By Criminalizing Commercial Sex Abroad*, 30 SUFFOLK TRANSNAT'L L. REV 515 (2007) (discussing *United States v. Clark*, 435 F.3d 1100 (9th Cir. 2006), and its ruling that the PROTECT Act is constitutional because Congress traditionally has broad authority to regulate foreign commerce); Joana Doerfel, Comment, *Regulating Unsettled Issues in Latin America Under the Treaty Powers of the Foreign Commerce Clause*, 39 U. MIAMI INTER-AM. L. REV. 331, 342 (2008); James Asa High, Jr., *The Basis for Jurisdiction over U.S. Sex Tourists: An Examination of the Case Against Michael Lewis Clark*, 11 U.C. DAVIS J. INT'L L. & POL'Y 343, 365 (2005); Christine L. Hogan, Note, *Touring Commerce Clause Jurisprudence: The Constitutionality of Prosecuting Non-Commercial Sexually Illicit Acts Under 18 U.S.C. § 2423(c)*, 81 ST. JOHN'S L. REV. 641 (2007); Amy Messigian, Note, *Love's Labour's Lost: Michael Lewis Clark's Constitutional Challenge of 18 U.S.C. 2423(c)*, 43 AM. CRIM. L. REV. 1241 (2006); *Ninth Circuit Holds That Congress Can Regulate Sex Crimes Committed by U.S. Citizens Abroad—United States v. Clark*, 119 HARV. L. REV. 2612 (2006). A few other scholars have discussed the Foreign Commerce Clause legal framework, but primarily as applied on the domestic front instead of as applied to laws with extraterritorial reach. *See, e.g.*, Kenneth M. Casebeer, *The Power to Regulate "Commerce with Foreign Nations" in a Global Economy and the Future of American Democracy: An Essay*, 56 U. MIAMI L. REV. 25, 43 (2001); Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1165–72 (2003). Only one scholar has expressly analyzed the legal framework of the Foreign Commerce Clause as it applies to laws with exterritorial reach, but the legal framework adopted is a version of the Interstate Commerce Clause, which, as discussed in the next section of this article, fails to take into account reasons why such a framework may not work. *See* Colangelo, *supra* note 39, at 985–1041.

47. *See infra* Subsection II.B.2.b.

48. United States v. Weingarten, 632 F.3d 60, 70–71 (2d Cir. 2011) ("We note, finally, that our determination that § 2423(b) [of the PROTECT Act] does not extend to travel occurring wholly between foreign nations and without any territorial nexus to the United States [is a matter of statutory interpretation and] *appropriately avoids the necessity of addressing whether*

This Article, therefore, attempts to set forth a comprehensive and practical legal framework that courts and Congress might consider when confronted with Foreign Commerce Clause matters, particularly federal laws that regulate the conduct of U.S. citizens abroad. Should courts simply recast the legal framework of the Interstate or Indian Commerce Clauses onto the Foreign Commerce Clause? As analyzed in the remainder of this Article, given the historical, textual, and theoretical differences underlying the Foreign Commerce Clause, it is apparent that courts should apply a new and distinct legal framework when considering the extent of Congress's foreign commerce power. This is the first Article to advocate for and present a new and distinct legal framework for the Foreign Commerce Clause.[49]

## II. THE FOREIGN COMMERCE CLAUSE LEGAL FRAMEWORK: EXISTING OPTIONS INADEQUATE

The Commerce Clause identifies three specific groups "among" or "with" which Congress can regulate commerce: "among the several States;" "with foreign Nations," and "with the Indian Tribes."[50] As discussed in depth in this section, these three distinct groups have given rise to three commerce clauses, each of which has its own distinct line of cases: (1) the Interstate Commerce Clause; (2) the Foreign Commerce Clause; and (3) the Indian Commerce Clause.[51] There are numerous scholarly debates on what the tests should be for the Interstate

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*such an exercise of congressional power would comport with the Constitution*.") (emphasis added).

49. Colangelo is the only scholar to have expressly written on the legal structure of the Foreign Commerce Clause as it applies to the United States' relationship with foreign countries. Colangelo, *supra* note 39. This Article, however, is distinguishable from Colangelo's approach in two ways. First, Colangelo argues that, because of national sovereignty concerns, the Foreign Commerce Clause power does not give Congress the right to make laws *inside* other nations. *See id.* at 954–55. I agree; however, this point misses an interesting issue. To what extent does the Foreign Commerce Clause allow Congress to regulate *U.S. citizens' conduct inside* such nations? *See infra* Part III (discussing this issue). Colangelo does not squarely address this issue. This leads to the second difference between our articles. In setting forth the legal framework for the Foreign Commerce Clause, Colangelo "recast[s] the Supreme Court's three-category [Interstate] Commerce Clause framework for the Foreign Commerce Clause." Colangelo, *supra* note 39, at 955 (citation omitted). I disagree with superimposing such a framework. Instead, I argue that a new and distinct legal framework is necessary. *See infra* Parts II and III (discussing why the Interstate Commerce Clause framework does not work and why a new framework is necessary).

50. Congress is allowed "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. 1, § 8, cl. 3.

51. There are scholarly debates about whether there should even be three commerce clauses. *Compare* Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of the Intrasentence Uniformity*, 55 ARK. L. REV. 1149 (2003), *with* Adrian Vermeule, *Three Commerce Clauses? No Problem*, 55 ARK. L. REV. 1175 (2003).

and Indian Commerce Clauses.[52] The purpose of this Article is not to advocate for or critique such debates. [53] Rather, the limited purpose of this Article is to scrutinize whether the current legal framework (good or bad) of either the Interstate or Indian Commerce Clause should be applied to the Foreign Commerce Clause.[54]

The majority of the lower courts have applied the legal framework of the Interstate Commerce Clause to Foreign Commerce Clause issues without explaining why.[55] To determine whether this application is the right method, it is essential to first understand the Founders' and the Supreme Court's understandings of the Interstate Commerce Clause.[56] A review of the Interstate Commerce Clause will show that, although convoluted, the underlying concern of its legal framework is to preserve state sovereignty. Such a concern is completely absent when dealing with the Foreign Commerce Clause.[57] Thus, as first addressed below, simply superimposing the legal framework of the Interstate Commerce Clause is not a good option.

Yet, as discussed in the second part of this section, that is exactly what a majority of courts have done. Without much thought, a majority of lower courts have applied the legal framework of the Interstate Commerce Clause onto the Foreign Commerce Clause when federal laws with extraterritorial reach are challenged.[58] There are, however, a few courts which have adopted a new "tenable nexus" test resulting in a

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52. *See infra* Sections II.A and II.C. There is even a lively scholarly debate on how to define "commerce," which is further discussed in Section III.C. *Compare* Robert J. Pushaw, Jr., *Obamacare and the Original Meaning of the Commerce Clause: Identifying Historical Limits on Congress's Powers*, 2012 U. ILL. L. REV. 1703 (2012) [hereinafter Pushaw, *Obamacare*], *with* AKHIL REED AMAR, AMERICA'S CONSTITUTION 107–08 (2005), *and* Jack Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010).

53. For a good analysis of the scholarly debate of how the Commerce Clause should be interpreted, see, e.g., Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 ARK. L. REV. 1185 (2003).

54. For more in depth summaries of the history of the Commerce Clause, see, e.g., AMAR, *supra* note 52, at 107–08; ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES § 3.3 (4th ed., Aspen 2011); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 4 (8th ed. 2010); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 807–32 (3rd ed. 2000); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 9–42 (1999) [hereinafter Nelson & Pushaw, *First Principles*].

55. *See infra* Section II.B.

56. *See infra* Section II.A; *see also* NOWAK, *supra* note 54, § 4.1 at 158 ("The history of the commerce clause adjudication is, in a very real sense, the history of federalism. It therefore is necessary to look at the treatment that the Supreme Court has given this clause throughout each stage in its history, before summarizing the Court's current position.").

57. *See infra* Section II.A.

58. *See infra* Section II.B.

circuit split.[59] While this Article agrees with these courts that a distinct legal framework for the Foreign Commerce Clause is necessary, as discussed below, this new "tenable nexus" test is so ill-defined that it is seemingly limitless. Courts need a more thorough legal framework when considering the extent of Congress's foreign commerce power.

Finally, the Foreign Commerce Clause and the Indian Commerce Clause share the same "with" language in the Constitution,[60] so arguably there might be reason to think that the tests should be similar to each other. However, as examined in the third part of this Section, the Indian Commerce Clause has a distinct legal framework based on the unique historical relationship the federal government has with Indian Tribes. [61] As such, it does not make sense to simply recast the broad power Congress has under the Indian Commerce Clause onto the Foreign Commerce Clause.

In sum, this section addresses three possible options courts could adopt when analyzing Congress's foreign commerce power. None of these options work. Therefore, this section concludes that the Foreign Commerce Clause needs its own distinct and comprehensive legal framework that reflects relevant history, precedent, and text.

### A. *Option #1: The Interstate Commerce Clause Legal Framework—Too Distinctive and Complex*

The Interstate Commerce Clause, particularly in comparison to the Foreign Commerce Clause, has been widely litigated and numerous scholars have written about it.[62] It has recently received even more attention[63] given that Congress's power under the Interstate Commerce Clause was one of the main issues that deeply divided the Court in *National Federation of Independent Business v. Sebelius*,[64] the Obamacare case. Since many lower courts are superimposing the legal

59. *See id.*

60. U.S. CONST. art. 1, § 8, cl. 3.

61. *See infra* Section II.C.

62. *See, e.g.*, AMAR, *supra* note 52, at 107–87; Nelson & Pushaw, *First Principles*, *supra* note 54, at 9–42.

63. *See, e.g.*, Adam Liptak, *Supreme Court Upholds Health Care Law, 5-4, in Victory for Obama*, N.Y. TIMES, June 28, 2012, http://www.nytimes.com/2012/06/29/us/supreme-court-lets-health-law-largely-stand.html?page wanted=all; Matt Negrin & Ariane de Vogue, *Supreme Court Health Care Ruling: The Mandate Can Stay*, OTUS NEWS, June 28, 2012, http://abcnews.go.com/Politics/OTUS/supreme-court-announces-decision-obamas-health-care-law/story?id=16663839&page=2#.UCF9Ixy1l0s.

64. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012). The Court was unable to come to any consensus concerning the analysis of the Interstate Commerce Clause issue, although a majority of Justices (Roberts, Scalia, Kennedy, Thomas, and Alito) concluded that Congress exceeded its Commerce Clause power in enacting the individual mandate which required purchase of health care insurance. *Id.* at 2593, 2644–50. *See also infra* notes 126–32 and accompanying text discussing *Sebelius*.

framework of the Interstate Commerce Clause onto the Foreign Commerce Clause,[65] it is imperative first to understand Congress's interstate commerce power so that it can be assessed whether courts should consider that same framework when analyzing the Congress's foreign commerce power. As this section concludes, the history and current legal landscape of the Interstate Commerce Clause points to one conclusion—this framework does not work for the Foreign Commerce Clause because it is specifically tailored to address federalism and state sovereignty concerns, which have no relevance to Congress's relationship with foreign nations.

### 1. History

Historically, the lack of the power conferred under the Interstate Commerce Clause was one of the defects that induced the adoption of the Constitution and the abandonment of the Articles of Confederation.[66] Prior to the colonial revolution, the power to regulate American commerce rested entirely in the hands of the English crown.[67] After the revolution, although the colonies distrusted centralized power, they recognized the importance of maintaining a central government so that they could organize a common defense against British and other foreign attacks.[68] Thus, the federal government's powers under the Articles of Confederation were limited to those necessary for national defense, but the power over commerce, including foreign commerce, was excluded. [69] Subsequently, states enacted personally favorable

65. *See infra* Section II.B.

66. As Justice Ginsburg recently explained: "The Commerce Clause, it is widely acknowledged, 'was the Framers' response to the central problem that gave rise to the Constitution itself.'" *Sebelius*, 132 S. Ct. at 2615 (Ginsburg, J., dissenting) (quoting EEOC v. Wyoming, 460 U.S. 226, 244–45, n.1 (1983) (Stevens, J., concurring)).

67. *See, e.g.*, 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 139 (Leonard W. Levy ed., Da Capo Press 1970) (1833) ("[A]ll subjects and their children inhabiting [the colonies] shall be deemed natural-born subjects, and . . . the laws of England . . . shall be in force there; and no laws shall be made which are repugnant to . . . the laws of England."); Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 855 (2002).

68. STORY, *supra* note 67, at 217–18

69. *See* ARTICLES OF CONFEDERATION of 1778, art. IX, para. 1 (granting to the federal government powers similar to those assumed during the revolution, including the power to determine peace or war, to send ambassadors to foreign nations, to form treaties and alliances, and to enforce and regulate maritime law). Under the Articles of Confederation, the federal government did not have power over commerce:

> The United States, in Congress assembled, shall have the sole and exclusive right and power of . . . entering into treaties and alliances, provided that no treaty of commerce shall be made, whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the

commercial regulations that often directly conflicted with the regulations in neighboring states.[70] The federal government was unable to prevent the states from implementing protectionist laws which destroyed the national economy.[71] The Interstate Commerce Clause was "an addition which few oppose[d] and from which no apprehensions [were] entertained."[72]

Although most agreed there was a need for the Interstate Commerce Clause, the Founders' guiding principle was to limit federal government power and protect state sovereignty. Madison explained: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[73] Thus, while the Constitution gave Congress enumerated power in the Interstate Commerce Clause, it left the power to regulate all non-commerce matters to the states.[74] This

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> exportation or importation of any species of goods or commodities whatsoever . . . .

*Id.*

70. STORY, *supra* note 67, at 239–40.

71. As Chief Justice Marshall noted:

> The oppressed and degraded state of commerce previous to the adoption of the constitution can scarcely be forgotten. . . . Congress, indeed, possessed the power of making treaties, but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless. . . . It may be doubted whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by Congress.

Brown v. Maryland, 25 U.S. 419, 445–46 (1827). The Court has further observed that:

> "[t]he few simple words of the Commerce Clause . . . reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."

Hughes v. Oklahoma, 441 U.S. 322, 325–26 (1979).

72. THE FEDERALIST NO. 45, at 293 (James Madison) (Clinton Rossiter ed., 1961).

73. *Id.* at 292.

74. *See, e.g.*, Robert J. Pushaw, Jr., *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 9 LEWIS & CLARK L. REV. 879, 886–87 (2005) [hereinafter Pushaw, *Counter-Revolution*] ("Most importantly, an overarching Federalist theme was that the new Constitution would meet the crying need for uniform national regulation of interstate commerce, but would leave to the states their existing 'police powers' over internal, noncommercial matters of public health, safety, morality, and social welfare. The Commerce Clause would thereby help America develop a common market without interfering with each state's ability to respond to its unique culture, customs, and social mores.") (footnotes omitted).

federalism concern, defining the balance of power between the federal government and states, has been the subject of a long line of Interstate Commerce Clauses cases and is briefly discussed next.

### 2. Current Legal Landscape

According to the Court, the "interpretation of the [Interstate] Commerce Clause has changed as our Nation has developed."[75] For the first century, Congress primarily used the power of the Interstate Commerce Clause "as a limit on state legislation that discriminated against interstate commerce."[76] Because the industrial revolution ushered in "an increasingly interdependent national economy,"[77] during the late 1800s Congress enacted the Interstate Commerce Act of 1887 and the Sherman Antitrust Act, both of which targeted monopolistic practices.[78] The Court found both of these federal laws constitutional under the Interstate Commerce Clause because "the interstate and intrastate aspects of commerce were so mingled together that full regulation of interstate commerce required incidental regulation of intrastate commerce."[79]

By 1942, the Court in *Wickard v. Filburn* extended the power of Congress under the Interstate Commerce Clause to regulate a farmer's decision to grow wheat on his own farm for personal consumption (intrastate activity).[80] In *Wickard,* the Court explained that the decision to consume only homegrown wheat allowed the farmer to avoid purchasing wheat on the market, which would have a "substantial effect" on the interstate wheat market when considered in the aggregate.[81] *Wickard* is regarded as "perhaps the most far reaching example of [Interstate] Commerce Clause authority over intrastate activity."[82] Indeed, up until the 1995 decision in *United States v. Lopez*[83] "the Supreme Court did not find one federal law unconstitutional as exceeding the scope of Congress's commerce

75. United States v. Morrison, 529 U.S. 598, 607 (2000).

76. United States v. Lopez, 514 U.S. 549, 553 (1995) (citing Veazie v. Moor, 55 U.S. 568 573–75 (1853) (upholding state monopoly where activity involved regulation of internal commerce); Kidd v. Pearson, 128 U.S. 1, 17, 20–22 (1888) (upholding state law concerning the manufacture of liquor as "purely internal domestic commerce of a State").

77. Gonzales v. Raich, 545 U.S. 1, 16 (2005).

78. Interstate Commerce Act, 24 Stat. 379 (1887) (regulating the railroad industry and later other common carriers); Sherman Antitrust Act, 26 Stat. 209 (1890) (currently codified at 15 U.S.C. §§ 1–7 (2006)).

79. *Lopez*, 514 U.S. at 554 (*citing* The Shreveport Rate Cases, 234 U.S. 342, 353 (1914)).

80. Wickard v. Filburn, 317 U.S. 111, 114–15, 128–29 (1942).

81. *Id.* at 127–29.

82. *Lopez*, 514 U.S. at 560.

83. *Id.*

power."[84]

In *Lopez* the Court articulated the current legal framework applied to Interstate Commerce Clause issues.[85] The Court in *Lopez* held that Congress exceeded its power under the Interstate Commerce Clause by enacting a criminal law that made it illegal for an individual to possess a gun near a school.[86] In coming to this conclusion, the Court first reviewed the historical "watershed" cases[87] dealing with Congress's power under the Interstate Commerce Clause and then "[c]onsistent with this structure, [] identified three broad categories of activity that Congress may regulate under its commerce power."[88] These three categories include: (1) "the use of the channels of *interstate* commerce;" (2) "the instrumentalities of *interstate* commerce, or persons or things in *interstate* commerce;" and (3) "activities that substantially affect *interstate* commerce."[89] It is important to note that each of these three categories specifically refer to "interstate commerce;" there is no mention of foreign commerce. Each of these three categories has produced its own line of precedents; however, the third category (substantial effects) has been litigated the most and is therefore the most complex. This Article will briefly discuss the three-category framework to show that the Court's underlying concern was state sovereignty, a nonissue for the Foreign Commerce Clause (and, thus why it does not make sense to superimpose the legal framework of the Interstate Commerce Clause onto the Foreign Commerce Clause).

Under the first category (channels), Congress may regulate the conduits, such as highways, airspace, and navigable waterways of interstate transportation. For example, Congress may criminalize the movement across state lines of stolen goods or kidnapped persons,[90] the shipment of goods across state lines in violation of labor laws,[91] the transportation across state lines of women for prostitution,[92] and the mailing of lottery tickets.[93] Under this category, Congress may also

84. CHEMERINSKY, *supra* note 54, § 3.3.5, at 269.

85. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 16–17 (2005); Pierce County, Wash. v. Guillen, 537 U.S. 129, 146–47 (2003); United States v. Morrison, 529 U.S. 598, 608–09 (2000) (all applying the *Lopez* framework to Interstate Commerce Clause issues).

86. *Lopez*, 514 U.S at 567.

87. *Id.* at 555–56 (mentioning NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); United States v. Darby, 312 U.S. 100 (1941); and Wickard v. Filburn, 317. U.S. 111 (1942)).

88. *Id.* at 558.

89. *Id.* at 558–59 (emphasis added). The Court has noted that these categories "are not precise formulations, and in the nature of things they cannot be." *Id.* at 567.

90. Perez v. United Sates, 402 U.S 146, 150 (1971).

91. United States v. Darby, 312 U.S. 100, 114–15 (1941).

92. Hoke v. United States, 227 U.S. 308, 320–23 (1913) (upholding the constitutional validity of the Mann Act (also referred to as the White Slave Act), 18 U.S.C. §§ 2421–24, under Congress's interstate commerce power).

93. Lottery Case, 188 U.S. 321, 354–55 (1903).

keep commerce free from "immoral and injurious uses"[94] such as prohibiting a motel from racial discrimination because the motel profits come from interstate travelers.[95]

Under the second category (instrumentalities), Congress may regulate the means of interstate travel such as "vehicles"[96] or the destruction, even intrastate, of aircraft.[97] The Court has sometimes relied on both the first and second categories to uphold a law. For example, in the 2003 case of *Pierce County, Washington v. Guillen,* the Court upheld congressional regulation of state-made reports concerning dangerous intrastate roadways under both the "channels" and "instrumentalities" categories.[98]

Significantly, for both category one (channels) and category two (instrumentalities) there is an undisputed jurisdictional "nexus to interstate commerce"[99] because both categories relate to movement between states or the means by which such movement takes place. Therefore, federal laws regulating channels or instrumentalities primarily regulate conduct between states, not in the states. As Justice

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94. Caminetti v. United States, 242 U.S. 470, 491 (1917).

95. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253 (1964) (finding Title II of the Civil Rights Act constitutional under the Commerce Clause because racial discrimination "imepede[d] interstate travel" through the channels of commerce); *see also Darby*, 312 U.S. at 118 (holding the Fair Labor Standards Act a proper exercise of Congress's power under the Interstate Commerce Clause because the "activities intrastate . . . so affect interstate commerce").

96. United States v. Lopez, 514 U.S. 549, 558 (1995) (citing Southern Ry. Co. v. United States, 222 U.S. 20, 26–27 (1911)).

97. *Id.* (citing Perez v. United States, 402 U.S. 146, 150 (1971)).

98. Pierce County, Washington. v. Guillen, 537 U.S. 129, 147–48 (2003). In *Guillen*, the Court examined the constitutionality of the Hazard Elimination Program, "which provide[d] state and local governments with [federal] funding to improve the most dangerous sections of their roads. To be eligible for funds under the Program, a state or local government must [have] undertake[n] a thorough evaluation of its public roads." *Id.* at 133. To encourage states to participate, Congress subsequently modified the program and determined that reports made pursuant to the program "shall not be admitted into evidence in Federal or State court."*Id.* at 134. In a unanimous decision, the Court upheld the constitutionality of the federal program under the Interstate Commerce Clause because

> "[i]t is well established that the Commerce Clause gives Congress authority to 'regulate the use of the channels of interstate commerce.' In addition, under the Commerce Clause, Congress 'is empowered to regulate and protect the instrumentalities of interstate commerce . . . even though the threat may come only from intrastate activities.'"

*Id.* at 146–47 (citations omitted). The Court concluded: "Congress could reasonably believe that adopting a measure eliminating an unforeseen side effect of the information-gathering requirement . . . would result in more diligent efforts to collect the relevant information, more candid discussions of hazardous locations, better informed decisionmaking, and, ultimately, greater safety on our Nation's roads." *Id.* at 147.

99. *Lopez*, 514 U.S. at 562.

Scalia explained: "The first two categories are self-evident, since they are the ingredients of interstate commerce itself."[100]

For the third category, which allows Congress to regulate activities that substantially affect interstate commerce, the Court has devised an elaborate legal framework that is "the most unsettled" and "most frequently disputed."[101] Four key cases, each of which will be taken in turn, help illustrate the complexity of the "substantial effects" category; these cases include: *United States v. Lopez*,[102] *United States v. Morrison*,[103] *Gonzales v. Raich,*[104] and *National Federation of Independent Business v. Sebelius*.[105] It is important to understand the development of law in these four cases because a majority of lower courts are superimposing the legal framework articulated in these cases onto the Foreign Commerce Clause.[106] Such superimposition is problematic, because, as illustrated below, the Court does not rely on, cite to, or even significantly mention the Foreign Commerce Clause in any of these cases, yet lower courts are mistakenly proceeding as if the Court did.

In *Lopez,* after articulating the three-category framework, the Court, in a five-to-four decision, applied the "substantial effects" category to strike down a statute making it a federal crime to possess a gun in a school zone.[107] The Court found that this criminal law, which was aimed only at possession (as opposed to the buying, selling, or transportation across state lines), had "nothing to do with 'commerce' or any sort of economic enterprise."[108] The Court rejected the Government's aggregation argument that gun possession led to violent crimes that in turn affected the national economy.[109] The Court refused "to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[110] Thus, while the Court's main concern was to protect the sovereignty of the state's

100. Gonzales v. Raich, 545 U.S. 1, 34 (2005) (Scalia, J., concurring) (citation omitted).

101. United States v. Patton, 451 F.3d 615, 622 (10th Cir. 2006).

102. 514 U.S. at 549.

103. 529 U.S. 598, 609–13 (2000).

104. 545 U.S. 1.

105. 132 S. Ct. 2566, 2578 (2012).

106. *See infra* Section II.B. (discussing how lower courts are applying the Interstate Commerce Clause legal framework onto the Foreign Commerce Clause).

107. *Lopez*, 514 U.S. at 567.

108. *Id.* at 561.

109. *Id.* at 563–64. The Court explained that the federal criminal law could not "be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Id.* at 561.

110. *Id.* at 567.

general police power, there is no such concern under the Foreign Commerce Clause. In *Lopez*, the Court also had two other concerns about the federal law: the statute failed to have any language to establish a "jurisdictional element" to interstate commerce; and, while the Court would not exclusively defer to congressional findings that the law affected interstate commerce, the complete lack of it was problematic.[111]

Five years later in *Morrison*, another five-to-four decision,[112] the Court struck down the Violence Against Women Act.[113] Although in *Morrison* there were specific congressional findings (which were lacking in *Lopez*) that violence against women impacted the national economy, the Court held that the law did not regulate activity that substantially affected interstate commerce.[114] The Court flatly rejected the congressional regulation of "noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[115] The Court explicitly noted that its decision relied on the principles of state sovereignty: "Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."[116] *Lopez* and *Morrison* represented the first time in almost sixty years an instance in which the Court held that a federal statute violated Congress's Interstate Commerce Clause. This caused some scholars to conclude that the Court was attempting to reign in Congress's power under the Interstate

111. *Id.* at 562–63 (explaining that "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce . . . . But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce . . . they are lacking here.") (citations omitted).

112. United States v. Morrison, 529 U.S. 598, 617 (2000).

113. The Violence Against Women Act, 42 U.S.C. § 13981 (1994).

114. In rejecting the congressional findings that interstate commerce was impacted, the Court explained:

> [T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation . . . . "[[W]]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court."

*Morrison,* 529 U.S. at 614 (citing *Lopez*, 514 U.S. at 557, n.2).

115. *Morrison*, 529 U.S. at 617. As one scholar concluded: "After *Lopez*, it is very difficult for Congress to impose a federal criminal punishment in intra-state activity if [it] is not commercial in character. The Court will not aggregate non-commercial, intra-state activity." NOWAK & ROTUNDA, *supra* note 54, § 4.10(c), at 201.

116. *Morrison*, 529 U.S. at 618 (citations omitted).

Commerce Clause.[117] However, a few years later came *Raich.*[118]

In *Raich*, the Court upheld the Controlled Substance Act, which criminalized the production and use of homegrown marijuana for medicinal use even though the activities were allowed under state law.[119] The Court first determined under the Interstate Commerce Clause that Congress had the power to enact a "'general regulatory statute'" dealing with the manufacture and possession of drugs, including marijuana.[120] Then, analogizing to *Wickard* and relying on the Necessary and Proper Clause,[121] the Court concluded: "[A]s in *Wickard,* when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce . . . among the several States.'" [122] The Court distinguished *Lopez* and *Morrison* by pointing out that the federal laws at issue in those cases were not part of comprehensive regulatory schemes.[123]

There has been much debate about whether *Lopez* and *Morrison* were outliers, and whether their holdings were consistent with *Raich*.[124] For the limited purposes of this Article, however, the significant takeaway is that the three-category framework articulated in *Lopez* is

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117. *See, e.g.*, Pushaw, *Counter-Revolution, supra* note 74, at 882 (noting that "the Court [in Gonzales v. Raich, 545 U.S. 1, 33 (2005)] held that any commodity with an interstate market (including marijuana) was 'commercial' or 'economic'"); *see also* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 217–21 (Oxford University Press 1998) (supporting the proposition that the justices who decided *Wickard* knew that almost any activity, when viewed in the aggregate, substantially affected interstate commerce).

118. *Raich*, 545 U.S. 1.

119. *Id.* at 5–9.

120. *Id.* at 17 (citations omitted).

121. U.S. CONST. art. I, § 8, cl. 18 (the Necessary and Proper Clause).

122. *Raich*, 545 U.S. at 22 (quoting U.S. CONST. art. I, § 8, cl. 18).

123. *Raich*, 545 U.S. at 23–26.

124. For example, one scholar wrote:

> Was a revolution afoot [after the *Lopez* and *Morrison* decisions], which would shake the foundations of New Deal and Great Society legislation that had long ago received judicial blessing? Or would the Court confine its doctrinal innovations to the invalidation of a few recent laws on "hot button" issues that largely duplicated existing legislation, such as bans on guns near schools and sexual assault? In *Gonzales v. Raich*, the Court appeared to choose the latter path.

Pushaw, *Counter-Revolution*, *supra* note 74, at 882. Another scholar concluded that in *Raich,* "[t]he Court did not change the test for the commerce clause that it has followed since *Lopez* in 1995 . . . . Instead, *Gonzales v. Raich* stands for the proposition that intrastate production of a commodity sold in interstate commerce is economic activity and thus substantial effect can be based on cumulative impact." CHEMERINSKY, *supra* note 54, § 3.3.5, at 277.

the way the Court analyzes the Interstate Commerce Clause issues, even if it is often "mechanically recited."[125] This was confirmed in *Sebelius*, where a deeply fractured Court found the individual mandate to buy health insurance unconstitutional under the Interstate Commerce Clause (and Necessary and Proper Clause), but constitutional under the Taxing Clause.[126] For the commerce clause issue, Chief Justice Roberts explained that Congress was attempting to create commerce by requiring the individual mandate, but that the Commerce Clause limited Congress "to regulate" already existing commerce.[127] The "dissenters," made-up of Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito, relied on a similar rationale to find Congress's action unconstitutional.[128] Justice Ginsberg writing for the dissent considered the issue under the "substantial effects" category and concluded that the individual mandate was constitutional because "the uninsured, as a class, substantially affect interstate commerce."[129]

The importance of *Sebelius* is that, although the Court was deeply divided, the *Lopez* three-category framework for Interstate Commerce Clause issues, despite its complexity and malleability,[130] was plainly applied by the majority of the Court,[131] and, indeed, not questioned by any Justice except Thomas.[132] Thus, it appears that the *Lopez* three-category framework for the Interstate Commerce Clause is here to stay.

3. Legal Framework Inapplicable to the Foreign Commerce Clause

Overall there are two key points to take away concerning the Interstate Commerce Clause legal framework, both of which suggest

125. *Raich*, 545 U.S. at 33–34 (Scalia, J., concurring).

126. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2608 (2012). In *Sebelius*, five Justices (Roberts, C.J., and, writing separately, Scalia, Kennedy, Thomas, and Alito, J.J.) concluded that the individual mandate was unconstitutional under the Interstate Commerce Clause. *Id.* at 2593, 2650. Five Justices (Roberts, C.J., and, writing separately, Ginsburg, Sotomayor, Breyer, and Kagan, J.J.) concluded that the individual mandate was within Congress's power under the Taxing Clause. *Id.* at 2599.

127. *Id.* at 2586. (Roberts, C.J., concurring) ("But Congress has never attempted to rely on [the Commerce Clause] power to compel individuals not engaged in commerce to purchase an unwanted product . . . . The power to *regulate* commerce presupposes the existence of commercial activity to be regulated.") (emphasis in original).

128. *Id.* at 2644 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

129. *Id.* at 2617 (Ginsberg, J., concurring).

130. *See, e.g.*, Pushaw, *Counter-Revolution*, *supra* note 74, at 908 (critiquing the *Lopez* framework as too flexible and subject to political whims).

131. *Sebelius*, 132 S. Ct. at 2578, 2616, 2646, 2677 (Roberts, C.J., and, in a separate opinion, Ginsburg, Sotomayor, Breyer, and Kagan, J.J., plainly applying the *Lopez* framework; Scalia, Kennedy, and Alito, J.J., not questioning *Lopez*).

132. *Id.* at 2677 (Thomas, J., dissenting) (determining that the "'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with the Court's early Commerce Clauses cases").

that it is, and should remain, distinct from the Foreign Commerce Clause legal framework. First, when the Court in *Lopez* identified the three categories of commerce that Congress can regulate, the Court *only* considered the history of the Interstate Commerce Clause and the cases dealing with it. The Court did not consider the history of or any case dealing with the Foreign Commerce Clause (or the Indian Commerce Clause).[133] Indeed, in key subsequent cases where the Court applied the *Lopez* three-category framework, the Court made no significant reference to congressional power to regulate commerce with foreign nations.[134] The lack of any mention of the Foreign Commerce Clause in the numerous cases dealing with the Interstate Commerce Clause strongly suggests that when the Court developed the legal framework in the key cases discussed above, it was focused *solely* on commerce among the states.[135] Thus, there is no reason that the Interstate Commerce Clause legal framework should be artificially superimposed on the Foreign Commerce Clause.

Second, in developing the Interstate Commerce Clause's three-category framework set forth in *Lopez*, the Court considered as a "first principle[]" that the federal government, which is limited in power, should not encroach on state sovereignty. Specifically, instances where Congress attempts to regulate noneconomic intrastate violent criminal activity, such as possession of guns near a school zone as in *Lopez* or gender-motivated violence as in *Morrison*, the Court is particularly weary of invading that state's general police power.[136] As the Court explained in *Morrison*: "[Our] concern . . . [is] that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority."[137] There is, however,

133. *See* United States v. Lopez, 514 U.S. 549, 552–59 (1995).

134. *See, e.g.*, *Sebelius*, 132 S. Ct. at 2608 (providing no analysis of Congress's power to regulate commerce with foreign nations or Indian tribes); Gonzales v. Raich, 545 U.S. 1, 32–33 (2005); Pierce County, Wash. v. Guillen, 537 U.S.129,147–48 (2003); United States v. Morrison, 529 U.S. 598, 608–09 (2000).

135. As one scholar concluded:

> [T]hroughout the years, the Justices have never recognized any important or legitimate state interest in foreign affairs or dealings with American Indians. Thus, when the Court was seeking to reserve powers for the states under the Tenth Amendment, it had no cause to use that concept to restrict the federal powers in these areas.

*See* NOWAK & ROTUNDA, *supra* note 54, § 4.2(a), at 159.

136. "Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Morrison*, 529 U.S. at 618.

137. *Morrison*, 529 U.S. at 615 (explaining the Court's concern underlying its decision in both *Lopez* and *Morrison*). When laying out the *Lopez* framework for the Interstate Commerce Clause, the Court explained its rationale:

no such state sovereignty concern influencing the Foreign Commerce Clause. Thus, as analyzed in the next section, the Framers and the courts have determined that Congress's power under the Foreign Commerce Clause is broader than under the Interstate Commerce Clause.[138]

Both of these conclusions suggest that the Interstate Commerce Clause legal framework should not be superimposed onto the Foreign Commerce Clause. Indeed, such a framework is convoluted[139] and often results in a fractured Court.[140] Instead of superimposing the complexities of the Interstate Commerce Clause framework onto the Foreign Commerce Clause, a distinct (and straightforward) framework should be developed. As set forth below, the Court has created a distinct framework with respect to the Indian Commerce Clause. In applying a distinct test for the Indian Commerce Clause, the Court explicitly recognized that the state sovereignty concern imbedded in the Interstate Commerce Clause is absent in Congress's relationship with the Indian tribes.[141] Likewise, state sovereignty concerns are absent in Congress's relationship with foreign nations. Therefore, a separate legal framework needs to be developed for the Foreign Commerce Clause that aptly reflects the unique concerns of such a relationship.

*The Dormant Interstate Commerce Clause: A Further Illustration Why the Foreign Commerce Clause Should Have a Distinct Legal Framework.* The previous section exclusively considers cases where the

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> [T]he scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be so extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

*Lopez*, 514 U.S. at 557 (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)). *Laughlin Steel* is a watershed case that significantly broadened the scope of Congress's power under the Interstate Commerce Clause when it held the National Labor Relations Act, concerning collective bargaining, constitutional because the intrastate activities had "such a close and substantial relation to interstate commerce." *Laughlin Steel*, 301 U.S. at 37. Thus, even in those cases where the Court gave Congress significant power under the Interstate Commerce Clause, its underlying concern was federalism.

138. *See infra* Section II.B.

139. *See, e.g.*, United States v. Ho, 311 F.3d 589, 597 (5th Cir. 2002) ("The Supreme Court's Commerce Clause jurisprudence sometimes has yielded vague and uncertain legal standards."); Robert J. Pushaw, Jr., *Partial-Birth Abortion and the Perils of Constitutional Common Law*, 31 HARV. J.L. & PUB. POL'Y 519, 579 (2008) [hereinafter Pushaw, *Constitutional Common Law*] (explaining the development of the Interstate Commerce Clause legal framework as "analytical chaos").

140. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2593, 2599, 2650 (2012) (upholding the constitutionality of Obamacare by a deeply fractured Court).

141. *See infra* Section II.C.

Courts have interpreted the Interstate Commerce Clause as a grant of congressional authority. The flipside of this power is the "dormant" or "negative" Interstate Commerce Clause.[142] It refers to the judicial power to restrict states from passing laws that discriminate against or excessively burden interstate commerce.[143] The dormant Interstate Commerce Clause is not specifically articulated in the Constitution; however, the Court has determined that the doctrine is implied in and central to the regulation of interstate commerce.[144] Its purpose is to prevent a state "from retreating into economic isolation or jeopardizing the welfare of the Nation [by burdening] the flow of commerce across its borders."[145] The dormant Interstate Commerce Clause, therefore, reflects the Framer's "central concern" and the "immediate reason for calling the Constitutional Convention" which was "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."[146]

Notably, in developing the dormant Interstate Commerce Clause test, the Court focused on addressing this "economic Balkanization" issue (free flow of commerce among the states). An issue which in no way concerns the Foreign Commerce Clause, or any negative implications of it. It is therefore not surprising that in dormant Interstate Commerce

142. Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179 (1981).

143. Generally, the rule for the dormant Commerce Clause has evolved into a balancing test that makes state laws unconstitutional if the burden on interstate commerce outweighs local benefits. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."); *see also* City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (citing to *Pike*'s balancing test); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 441 (1978) (explaining that when considering dormant Interstate Commerce Clause issues, courts must consider "the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce").

144. *See, e.g.*, C&A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 401 (1994) (O'Connor, J., concurring) (stating that the scope of the dormant Commerce Clause is a judicial creation). The dormant Interstate Commerce Clause was first mentioned in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), when Chief Justice Marshall explained in *dicta* that the power to regulate interstate commerce "can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant." *Id.* at 189.

145. *Okla. Tax Comm'n*, 514 U.S. at 180. The dormant Commerce Clause has two objectives: it intends to create a national economic market by preventing states from imposing barriers to trade; and, it fosters political cohesion by inhibiting states from imposing reciprocal barriers. *See generally* Daniel J. Gifford, *Federalism, Efficiency, the Commerce Clause, and the Sherman Act: Why We Should Follow a Consistent Free-Market Policy*, 44 EMORY L.J. 1227, 1227 (1995) ("The focus of the dormant commerce clause is on free trade among the states.").

146. Hughes v. Oklahoma, 441 U.S. 322, 325–26 (1979).

Clause cases the Court has not analyzed or significantly addressed any issues related to foreign commerce.[147] Indeed, the only time the Court mentioned the relationship between the two was to comment that the market participation exception[148] to the dormant Interstate Commerce Clause doctrine did not apply to the Foreign Commerce Clause.[149] Simply put, how state laws impact the flow of commerce between states has no bearing on foreign commerce. It is for this reason that the Court developed a more elaborate legal framework for the dormant Foreign Commerce Clause that is addressed more fully in the next section.[150]

### 4. Relevant Themes

Although the legal framework for the Interstate and Foreign Commerce Clauses should be distinct, there are two general themes, which do not embody state sovereignty concerns that can be considered across the Clauses. First, when analyzing the constitutional validity of a statute, the Court considers congressional intent. The Court has advised that if Congress intends to use its commerce power, Congress should include an express "jurisdictional element"[151] that establishes "its connection" [152] to commerce. The Court has explained that, while not

147. *See, e.g.*, *Pike*, 397 U.S. at 142 (analyzing a dormant Interstate Commerce Clause issue without any significant reference to foreign commerce); *Okla. Tax Comm'n*, 514 U.S. at 180 (same); Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 348 n.17 (2008) (distinguishing a case involving the negative implication of "foreign commerce" as applying a "more rigorous" test than a case involving the dormant Interstate Commerce Clause (quoting South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 96 (1984))).

148. The market participant exception to the dormant Interstate Commerce Clause provides that when a state acts as a market participant, i.e. as a buyer or seller of goods or services, rather than as a market regulator, the dormant Interstate Commerce Clause does not apply. *See* Reeves v. Stake, 447 U.S. 429, 436–37 (1980); *Wunnicke*, 467 U.S. at 93.

149. *Reeves*, 447 U.S. at 437 n.9 (explaining "that [negative] Commerce Clause scrutiny [over state laws] may well be more rigorous when a restraint on foreign commerce is alleged"); *see also* Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 65 (1st Cir. 1999), *aff'd sub nom.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (explaining "we are skeptical of whether the market participation exception applies at all . . . to the Foreign Commerce Clause").

150. *See infra* Section II.B.

151. United States v. Lopez, 514 U.S. 549, 562–63 (1995) (explaining that while Congress does not need to "'make particularized findings in order to legislate,'" "as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings") (citations omitted); *see also supra* notes 106–10 and accompanying text (discussing that in *Lopez* the lack of a jurisdictional element to Congress's commerce power in the statute was problematic). One court explained that when considering the reach of Congress's commerce power, the court considers, among other factors, whether the "statute contains an express jurisdictional element involving interstate activity that might limit its reach," and whether "Congress has made specific findings regarding the effects of the prohibited activity on interstate commerce." United States v. Patton, 451 F.3d 615, 623 (10th Cir. 2006).

152. Gonzales v. Raich, 545 U.S. 1, 44 (2005) (O'Connor, J., dissenting) (explaining the *Lopez* decision).

determinative of constitutionality, "such a jurisdictional element would lend support to the argument that [a federal law] is sufficiently tied to . . . commerce to come within Congress' authority."[153] Thus, when Congress enacts a law under its foreign commerce power, it should explicitly set forth a jurisdictional hook to the Foreign Commerce Clause. Interestingly, when looking at laws with extraterritorial reach, it is a hit-or-miss whether Congress does so.[154]

Second, as evidenced by precedent, Congress's commerce power is undoubtedly broad,[155] but the Court has imposed some limits. In determining the limits, the Court has considered the unique relationship the federal government has with the impacted body. Thus, just as the Court limits Congress's interstate commerce power to reflect the unique relationship Congress has with the states,[156] so the limits on Congress's foreign commerce power should reflect the unique relationship Congress has with foreign nations. When considering what legal framework applies to the Foreign Commerce Clause, the court should keep these two themes in mind.[157]

In sum, although there a few relevant themes, history and precedent show that when the Court developed the legal framework for the Interstate Commerce Clause, both dormant and non-dormant, it did not consider the Foreign Commerce Clause. Instead, the Court was focused on state sovereignty and federalism concerns; such concerns are completely lacking in Foreign Commerce Clause cases which suggests that this power should be broader.[158] Yet, as examined in the next section, that framework is what lower courts inexplicably apply when confronted with Foreign Commerce Clause challenges to federal laws with extraterritorial reach.

### B. *Option #2: The Foreign Commerce Clause Legal Framework—In Disarray*

The Court has only decided a few cases that squarely deal with the Foreign Commerce Clause.[159] As discussed more fully below, those

153. United States v. Morrison, 529 U.S. 598, 598–99 (2000) (noting positively that Congress set forth a jurisdictional nexus to its interstate commerce power in the statute at question, but finding that congressional intent alone failed to make the statute constitutional).

154. *See infra* Appendix A (listing which federal laws with extraterritorial reach set forth an explicit jurisdictional component to Congress's commerce power).

155. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2585 (2012) (noting that "it is now well established that Congress has broad authority under the [Commerce] Clause").

156. *See supra* Subsection II.A.2 (discussing the current legal landscape of the Interstate Commerce Clause).

157. *See infra* Part III (considering a new test for the Foreign Commerce Clause).

158. *See infra* Section II.B (setting forth the numerous cases finding the Congress's foreign commerce power to be broader than its interstate commerce power).

159. *See* Japan Line, Ltd. v. Cnty. of Los Angeles, 441 U.S. 434, 449 (1979) (citing

cases primarily address the "negative implications" of the Foreign Commerce Clause that addresses the constitutionality of state laws—*i.e.*, the dormant Foreign Commerce Clause. Thus, while the Court has addressed whether a *state* statute is constitutional,[160] the Court has never addressed whether a federal law regulating the conduct of a U.S. citizen in a foreign nation is constitutional under the Foreign Commerce Clause.[161] This lack of guidance has left lower courts in disarray. As scrutinized below, a majority of the courts, without much explanation, simply apply the Interstate Commerce Clause's three-category framework as articulated in *Lopez* without acknowledging that the underlying concern of the framework (state sovereignty) is a non-issue for the Foreign Commerce Clause. Some courts, however, have rejected this framework, creating a circuit split. These courts have adopted a new "tenable nexus"[162] test for the Foreign Commerce Clause, but, because this new test is without any limits, it is problematic.[163]

As with the previous section, this section first explores the historical origins and treatment of the Foreign Commerce Clause. Next, this Section will examine the current legal landscape, starting with the dormant aspect of the Foreign Commerce Clause because it has the clearest application. As for the (non-dormant) Foreign Commerce Clause, two groups of cases emerge: those where federal laws regulate trade with foreign nations; and those where federal laws have extraterritorial reach. This second group of cases is where the circuits split and most of the confusion lies. This second group, which concerns the reach of the Foreign Commerce Clause over U.S. citizens who travel abroad, can be further divided into three lines of cases. The analyses in all three lines of cases, however, miss the mark as the courts fail fully to consider the history or the text of the Foreign Commerce Clause.

### 1. History

History shows that there were reasons, distinct from those underlying the Interstate Commerce Clause, why the Founders gave Congress the power to regulate commerce "with foreign Nations."[164] The need for federal uniformity in the context of foreign commerce

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Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976)); Champion v. Ames, 188 U.S. 321, 330 (1903); Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 187–89 (1983).

160. *Japan Line*, 441 U.S. at 450–51.

161. *See* United States v. Clark, 435 F.3d 1100, 1113 (9th Cir. 2006).

162. *Clark*, 435 F.3d at 1114.

163. *See Clark*, 435 F.3d at 1120 (Ferguson, C.J., dissenting); Daniel Bolia, Comment, *Policing Americans Abroad: the PROTECT Act, the Case Against Michael Lewis Clark, and the Use of the Foreign Commerce Clause in an Increasingly Flat World*, 48 S. TEX. L. REV. 797, 822–23 (2007).

164. U.S. CONST. art. I, § 8, cl. 3.

policy was of great importance to the Founders and one of the major reasons for the Constitutional Convention.[165] One of the most glaring defects in the Articles of Confederation was the federal government's inability to regulate foreign commerce.[166] The inability to regulate commerce with foreign nations resulted in a depression of the American economy as foreign nations flooded the colonies with cheap goods, while sales of American goods abroad lagged due to astronomical import duties.[167] Although initially some southern states expressed concern over strong congressional power to regulate foreign commerce because they feared that the North might control Congress, the inability of the Nation to speak with one voice, particularly in response to discriminatory British trade, trumped such concerns. [168] As James Madison explained, in order to remain competitive, the United States needed "uniformity" in dealing with "the ports of foreign nations, a stipulation of privileges reciprocal to those enjoyed by the subjects of such nations in the ports of the United States."[169]

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165. *See, e.g.*, H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533 (1949) ("The sole purpose for which Virginia initiated the movement which ultimately produced the Constitution was 'to take into consideration the trade of the United States; to examine the relative situations and trade of the said states; to consider how far a uniform system in their commercial regulation may be necessary to their common interest and their permanent harmony . . . .'"); Robert J. Delahunty, *Federalism Beyond the Water's Edge: State Procurement Sanctions and Foreign Affairs*, 37 STAN. J. INT'L L. 1, 17 (2001) ("Courts and legal scholars have long recognized that the desire for an effective national authority to regulate foreign commerce—more specifically, an authority that would enable the states to take concerted action to resist and retaliate against exclusionary British trade practices—was one of the primary causes of the agitation for the Constitution of 1787.") (citation omitted).

166. STORY, *supra* note 67, at 239.

167. *See id.* at 241–42. Part of the reason duties abroad were so high was Congress's inability to effectively negotiate commercial treaties to guarantee reciprocally low import duties. *Id.* Because foreign nations were aware that Congress did not have the power to assure that all states would act uniformly in accordance with the treaty terms, they refused to enter into reciprocal import agreements. *Id*. at 242–43. Moreover, because the several states acted in their independent self-interest and competed to attract foreign vendors, often foreign goods were not subject to duty, thus negating any incentive a foreign nation might have to negotiate such a treaty. *Id.*

168. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 4.2, at 159–60 (7th ed. 2004). These scholars note that "[t]he primary concern over congressional power in the international area came from the Southern states who feared that a broad power might be used to restrict the importation of slaves . . . [but this concern] was eliminated by expressly prohibiting Congress from banning the importation of slaves until 1808." *Id.* Southern states also feared that the North might control the Congress and thereby favor their trade centers, '[t]hus Section 9 of Article I insures that Congress will not tax exports or give preference to certain ports in matters of foreign trade." *Id.* at 160; *see also* Delahunty, *supra* note 165, at 17–18 (explaining that the Founders "feared the lack of power" of the Nation to speak with a unified voice to foreign nations "would undo the victory won by the Revolutionary War; lead to the disintegration of the Union . . . and invite European intervention in U.S. affairs").

169. Gibbons v. Ogden, 22 U.S. (9 Wheat.)1, 105 (1824); *see also* Colangelo, *supra* note

The notion that the federal government needed the power to regulate foreign commerce with one voice was of little debate among the Founders.[170] For example, Madison explained: "This class of powers [including the regulation of foreign commerce] forms an *obvious* and essential branch of the federal administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations."[171] Madison believed it was such an "obvious" power that "[t]he regulation of foreign commerce . . . has been too fully discussed to need additional proofs here of its being properly submitted to the federal administration."[172] Likewise, Hamilton noted "intercourse with foreign countries" is "one of those points about which there is least room to entertain a difference of opinion, and which has, in fact, commanded the most general assent of men who have any acquaintance with the subject."[173]

Even though the Foreign Commerce Clause became part of the Constitution "in parallel phrases" with the Interstate Commerce Clause, the Court has concluded, "there is evidence that the Founders intended the scope of the foreign commerce power to be the greater."[174] Indeed, the Court has consistently stated that Congress's power under the Foreign Commerce Clause is exclusive and broader than its power under the Interstate Commerce Clause.[175] Indeed, this view was

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39, at 963–64 (explaining that the "Founders' intent is plain" that the new federal government had to have exclusive power to regulate foreign commerce).

170. *See* Delahunty, *supra* note 165, at 25 (concluding, after an extensive look at the origins of the Foreign Commerce Clause, that "the Framers saw an overriding need to ensure that the national government had the power to enact uniform rules governing our commercial relations with foreign countries" and that such power "be vested in Congress").

171. THE FEDERALIST NO. 42, at 264 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

172. *Id*. at 266.

173. THE FEDERALIST NO. 11, at 84 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

174. Japan Line, Ltd. v. Cnty. of Los Angeles, 441 U.S. 434, 448 (1979).

175. *See*, *e.g.*, *id.* ("Foreign commerce is *pre-eminently* a matter of national concern.") (emphasis added); Bd. of Trs. of Univ. of Ill. v. United States, 289 U.S. 48, 59 (1933) ("In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power."); Buttfield v. Stranahan, 192 U.S. 470, 493 (1904) (describing congressional power to regulate foreign commerce concerning the importation of tea as "*exclusive and absolute*") (emphasis added); Bowman v. Chicago & N. Ry. Co., 125 U.S. 465, 482 (1888) ("Laws which concern the exterior relations of the United States with other nations and governments are general in their nature, and should proceed *exclusively* from the legislative authority of the nation.") (emphasis added); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 227 (1824) (Johnson, J., concurring) (explaining that power over foreign commerce "must be *exclusive*" because "it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon") (emphasis added); *see also* United States v. Guy W. Capps, Inc., 204 F.2d 655, 658–60 (4th Cir. 1953), *aff'd*, 348 U.S. 296 (1955) (noting that the "power to regulate foreign commerce is vested in Congress, not in the executive or the courts . . . . Imports from a foreign

articulated nearly two centuries ago when the Chief Justice John Marshall explained: "[i]t has, we believe, been universally admitted, that [the Foreign Commerce Clause] comprehend[s] every species of commercial intercourse between the United States and foreign nations."[176] The Court has explained that this power is greater because, while "Congress' power to regulate interstate commerce may be restricted by considerations of federalism and state sovereignty," there are no such concerns related to "Congress' power to regulate foreign commerce."[177]

The 1903 *Lottery Case*[178] is a good illustration of how the early Court, although divided on the reach of the Interstate Commerce Clause, collectively agreed that Congress had broader power under the Foreign Commerce Clause. In the *Lottery Case*, a deeply divided Court (five-to-four) held that Congress acted within its power under the Interstate Commerce Clause to pass a law that prohibited trafficking lottery tickets across state lines.[179] Notably, the four dissenting justices, who would have struck down the congressional act under the Interstate Commerce Clause, indicated that they would not place such restrictions under the Foreign Commerce Clause. The dissenters posed this question: "It is argued that the power to regulate commerce among the several states is the same as the power to regulate commerce with foreign nations, and with the Indian tribes. But is its scope the same?"[180] They answered this question in the negative explaining that the "power to regulate commerce with foreign nations and the power to regulate interstate commerce are to be taken *diverso intuitu*."[181] The Interstate Commerce Clause "was intended to secure equality and freedom in commercial intercourse as between the states, not to permit the creation of impediments to such intercourse," but the Foreign Commerce Clause "clothed Congress with that power over international commerce, pertaining to a sovereign nation in its intercourse with foreign nations, and subject, generally speaking, to no implied or reserved power in the states."[182] The dissenters concluded that "laws which would be

country are foreign commerce subject to regulation, so far as this country is concerned, by Congress alone").

176. *Gibbons*, 22 U.S. (9 Wheat.) at 193.

177. *Japan Line*, 441 U.S. at 448 n.13 (citing Nat'l League of Cities v. Usery, 426 U.S. 833, 842 (1976)).

178. Champion v. Ames (*Lottery Case*), 188 U.S. 321, 330 (1903).

179. *Id.*.

180. *Id.* at 333 (Fuller, J., dissenting).

181. *Id.*

182. *Id.* In his dissent, Justice Fuller also explained that the "same view must be taken as to commerce with Indian tribes. There is no reservation of police powers or any other to a foreign nation or to an Indian tribe, and the scope of the power is not the same as that over interstate commerce." *Id.* at 334.

necessary and proper in the one case would not be necessary or proper in the other."[183] Thus, while the Court was (and still is)[184] divided over the Interstate Commerce Clause power, there is general consensus that the Foreign Commerce Clause power is expansive.

This consensus has been the same in more recent cases where the whole Court has implicitly assumed that congressional power to regulate foreign commerce is broad. For example, in the 1993 case of *Hartford Fire Ins. Co. v. California*[185] the Court found that foreign companies acting in foreign countries could be held liable for violations of the Sherman Antitrust Act. Implicit in the Court's opinion was that the Sherman Antitrust Act was a permissible exercise of congressional power under the Foreign Commerce Clause. Justice Scalia, dissenting on a statutory issue, reveals how the Court made this constitutional assumption: "There is no doubt, of course, that Congress possesses legislative jurisdiction over the acts alleged in this complaint: Congress has broad power under Article I, § 8, cl. 3, '[t]o regulate Commerce with foreign Nations,' and this Court has repeatedly upheld its power to make laws applicable to persons or activities beyond our territorial boundaries where United States interests are affected."[186]

In sum, when considering what legal framework to apply to Foreign Commerce Clause issues, two important themes emerge from the history of the Foreign Commerce Clause and the Court's early treatment of the clause. First, the Founders and the Court understood that the federalism concerns underlying the Interstate Commerce Clause did not underlie the Foreign Commerce Clause. Second, because of the lack of federalism concerns, the Court has consistently interpreted congressional power under the Foreign Commerce Clause to be greater than the Interstate Commerce Clause.

### 2. Current Legal Landscape

Although the Court has consistently agreed that Foreign Commerce Clause power is broad, the consensus has been primarily built around those cases where the Court has considered what state action violates the *dormant* Foreign Commerce Clause. Specifically, the Court has applied a "one voice" test to find state action unconstitutional.[187] As far as the reach of Congress's power under the (non-dormant) Foreign Commerce Clause to regulate the conduct of U.S. citizen abroad, the Court has not articulated any test. This lack of guidance has caused disarray in lower courts, although the courts do rely on some themes

183. *Id.* at 333.
184. *See supra* note 64 and accompanying text.
185. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 799 (1993).
186. *Id.* at 813–14 (Scalia, J., dissenting) (citations omitted).
187. *See, e.g.*, Japan Line, Ltd. v. Cty. of Los Angeles, 441 U.S. 434, 451 (1979).

articulated in dormant Foreign Commerce Clause precedent.[188] Thus, this Section first discusses the Court's one voice test for the dormant Foreign Commerce Clause, and then tackles the confusion among the lower courts concerning the (non-dormant) Foreign Commerce Clause and why a new legal framework is necessary.

a. Dormant Foreign Commerce Clause Test: "One Voice"

Like the Interstate Commerce Clause,[189] the Foreign Commerce Clause also has a dormant aspect. The dormant power is derived from the negative implication that states are barred from enacting laws that discriminate against foreign commerce because the Constitution explicitly gives Congress the power to regulate it.[190] The dormant Foreign Commerce Clause one voice test has had its own distinct development "having been used primarily as a tool to limit the ability of the several states to intervene in matters affecting international trade."[191] The one voice test encompasses "the Framers' overriding concern that 'the Federal Government must speak with one voice when regulating commercial relations with foreign governments.'"[192]

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188. *See* Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 961 (2010).

189. *See supra* Section II.A.

190. Leanne M. Wilson, Note, *The Fate of the Dormant Foreign Commerce Clause After Garamendi and Crosby*, 107 COLUM. L. REV. 746, 760 (2007). Wilson explains:

> The dormant Foreign Commerce Clause is the analogue of the dormant Interstate Commerce Clause (commonly referred to as the dormant or negative Commerce Clause). Both get their name from the fact that there is no text in the Constitution that prohibits the states from regulating interstate or foreign commerce. But the Constitution grants to Congress the power to regulate interstate and foreign commerce, and the Court has read a negative aspect into each clause, essentially barring states from passing legislation that discriminates against commerce.

*Id*. at 746 n.4.

191. United States v. Pendleton, 658 F.3d 299, 306–07 (3d Cir. 2011), *cert. denied*, No. 11-7711, 2012 WL 2197195 (U.S. June 18, 2012).

192. *Japan Line*, 441 U.S. at 449; *see also* Michelin Tire Corp. v. Wages, 423 U.S. 276, 283 (1976). In *Michelin*, the Court explained the importance of the dormant Foreign Commerce Clause power to the Founders:

> "One of the major defects of the Articles of Confederation, and a compelling reason for the calling of the Constitutional Convention of 1787, was the fact that the Articles essentially left the individual States free to burden commerce . . . with foreign countries very much as they pleased. Before 1787 it was commonplace for seaboard States with port facilities to derive revenue to defray the costs of state and local governments by imposing taxes on imported goods destined for customers in other States. At the same time, there was no secure source of revenue for the central government.

In the preeminent dormant Foreign Commerce Clause case, *Japan Line, Ltd. v. County of Los Angeles*,[193] the Court articulated the "one voice" test—a test which provides that the United States must be able to respond with one voice in matters of foreign commerce. In this case, the Court held that a California ad valorem property tax of Japanese cargo ships was unconstitutional. The ships, owned by Japanese companies subject to Japanese tax, were operated exclusively in foreign commerce.[194] The Court found California's tax unconstitutional "because it prevents the Federal Government from *'speaking with one voice'* in international trade . . . [which is] inconsistent with Congress' power to 'regulate Commerce with foreign Nations.'"[195] The Court worried that other states might follow California's example (which Oregon, in fact, did[196]) subjecting "foreign owned containers . . . to various degrees of multiple taxation, depending on which American ports they enter."[197] Multiple taxation would also disadvantage the country of Japan resulting in the "risk of retaliation" which would be "felt by the Nation as a whole."[198] The Court concluded that "California, by its unilateral act, cannot be permitted to place these impediments before this Nation's conduct of its foreign relation and its foreign trade."[199] Such taxation made speaking with one voice "impossible."[200] The Court explained that its decision was limited to the "negative implications of Congress' power to 'regulate Commerce with foreign Nations' under the Commerce Clause."[201] In other words, the one voice test is specific to the dormant Foreign Commerce Clause.

There are some limits to the one voice test. For example, in *Container Corporation of America v. Franchise Tax Board*, the Court, applying the one voice test, found a California tax did not violate the

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*Id*.

193. *Japan Line*, 441 U.S. at 451–54.

194. *Id.* at 436.

195. *Id.* at 453–54 (emphasis added).

196. *Id*. at 453 (citing Ore. Op. Atty. Gen. No.7709 (Jan. 31, 1979)).

197. *Id.* at 453.

198. *Id.*

199. *Id.* In addition to the one voice concern, the Court also found the state tax unconstitutional because it resulted in impermissible "multiple taxation of the instrumentalities of foreign commerce." *Id.*. Specifically, Japan was within its rights to levy a property tax on the containers (and did so); thus, California's tax created a "double tax." *Id.* at 452. The Court explained that multiple taxation, which is "offensive to the Commerce Clause," created specific problems in the context of foreign commerce. *Id.* at 446. Unlike interstate commerce where the Court could require "that taxes be apportioned among taxing jurisdictions, so that no instrumentality of commerce is subjected to more than one tax on its full value," such full apportionment could not be enforced "when one of the taxing entities is a foreign sovereign." *Id.* at 447.

200. *Id.* at 453.

201. *Id.* at 449 (citing U.S. CONST. art. 1, § 8, cl. 3).

dormant Foreign Commerce Clause because it did not lead to "significant foreign retaliation."[202] In *Container Corporation*, a domestic company with foreign subsidiaries challenged California's unitary tax, an income tax on corporations calculated by the amount of their worldwide business that took place in California.[203] The Court found the tax did not violate the one voice rule because the state tax merely had "foreign resonances" and not one that "implicate[d] foreign affairs."[204] The Court distinguished *Container Corporation* from *Japan Line* by pointing out that, because there was little concern for the risk of retaliation against the United States by a foreign government as to what might be perceived as unfair tax by an individual state, the California business tax had an "attenuated" impact on foreign relations.[205]

The most important point of *Japan Line* and *Container Corporation* is that in developing the one voice test and its outer limits, the Court did not simply superimpose the exact legal framework of the dormant Interstate Commerce Clause.[206] Instead, the Court created a "more elaborate" [207] test relying on the "Framers' overriding concern" that the federal government be unified in its regulation of foreign commerce.[208] As one author concluded, "the justifications for the dormant Foreign Commerce Clause—fear of foreign retaliation and states unduly interfering with foreign affairs—are different from the justifications for

202. 463 U.S. 159, 194 (1983).

203. *Id.* at 162–63.

204. *Id.* at 194.

205. *Id.* at 195. *See also* Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 302, 330 (1994) (finding the same state regulation as in *Container Corp*. valid under the dormant Foreign Commerce Clause when the challenge was brought by a foreign corporation); Wardair Can., Inc. v. Fla. Dep't of Revenue, 477 U.S. 1, 12–13 (1986) (finding a Florida tax on aviation fuel valid under the dormant Foreign Commerce Clause). In some recent cases, the Court has opted to analyze state regulations of foreign commerce solely as a preemption issue instead of a dormant Foreign Commerce Clause issue. *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 412–13, 420 (2003) (finding the California Holocaust Victim Insurance Relief Act of 1999, which required disclosure about Holocaust-era insurance policies, invalid solely on preemption grounds even though the Ninth Circuit also analyzed it under the dormant Foreign Commerce Clause); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 371, 388 (2000) (finding the Massachusetts Burma Law, which prohibited state agencies from doing business with corporations who did business with Burma, invalid solely on preemption grounds even though the First Circuit also analyzed it under the dormant Foreign Commerce Clause); Wilson, *supra* note 190, at 766–67, 776 (arguing that "*Garamendi* and *Crosby* have changed the dormant Foreign Commerce Clause" so that it should be "abandoned" even though neither case analyzes the doctrine).

206. *See infra* Section II.A (discussing the dormant Interstate Commerce Clause).

207. *Japan Line*, 441 U.S. at 451 ("For these reasons, we believe that an inquiry *more elaborate* . . . is necessary when a State seeks to tax the instrumentalities of foreign, rather than of interstate, commerce.") (emphasis added).

208. *Id.* at 449.

the dormant Interstate Commerce Clause."[209]

Simply put, the Court did not strictly impose the legal framework of the dormant Interstate Commerce Clause onto the dormant Foreign Commerce Clause. It makes sense that the Court did not do so. As demonstrated in *Japan Line* and its progeny,[210] there are separate and distinct reasons underlying the dormant Foreign Commerce Clause legal framework. Likewise then, there is no reason to strictly impose Interstate Commerce Clause rules (*e.g.*, the *Lopez* three-category framework) on the Foreign Commerce Clause. Yet, as addressed in the next sub-section, that is precisely what a majority of lower courts have mistakenly done.

b. (Non-dormant) Foreign Commerce Clause: Circuit Splits

Although not explicitly recognized by the courts, when tackling the (non-dormant) Foreign Commerce Clause, two separate lines of cases emerge. Each line of cases analyzes distinct conduct. The first type of conduct concerns U.S. economic relationships with foreign countries and includes trade related matters like federal embargos and tariffs. This type of conduct is the flip side to the dormant Foreign Commerce Clause because it implicates the concern that the nation be able to speak with "one voice."[211] There is less confusion on how to analyze Congress's power under the Foreign Commerce Clause with this type of conduct. The second type of conduct concerns congressional power to regulate the conduct of U.S. citizens who travel in foreign commerce (the primary concern of this article). This second type of conduct raises interesting and novel issues – issues on which the Supreme Court has never spoken, leaving the lower courts without any guidance and resulting in circuit splits and convoluted opinions.

i. Conduct Related to Trade with Foreign Nations

In the *Board of Trustees of the University of Illinois v. United States*,[212] the Court squarely addressed congressional power to enact a

209. Wilson, *supra* note 190, at 786.

210. After *Japan Line*, the Court applied the one voice test to numerous dormant Foreign Commerce Clause cases, all of which involved a state tax statute being challenged. *See, e.g.*, *Barclay's Bank*, 512 U.S. at 311 ("A [state] tax affecting *foreign* commerce therefore raises [a concern dealing with] . . . the Federal Government's capacity to 'speak with one voice when regulating commercial relations with foreign governments.'") (emphasis in original) (citations omitted); *Wardair*, 477 U.S. at 9 (applying the one voice test to Florida tax on aviation fuel); Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 74–76 (1993) (applying the one voice test to Tennessee tax on leases of containers used in international shipping); Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 186, 193–96 (1983) (applying the one voice to California corporate franchise tax).

211. *See supra* Section II.B (on the dormant Foreign Commerce Clause).

212. 289 U.S. 48, 56, 58–59 (1933).

federal statute under the Foreign Commerce Clause. In this case, the University challenged the payment under the Tariff Act of 1922 claiming that it was a tax for which the school should be exempt from paying.[213] The University's argument that the tariff constituted a tax was rejected because in the Act itself Congress had created a jurisdictional hook to its power to regulate foreign commerce.[214] A unanimous Court upheld the Tariff Act as a valid exercise of congressional power under the Foreign Commerce Clause stating in sweeping terms that foreign commerce encompasses "'every species of commercial intercourse between the United States and foreign nations.'"[215] The Court went so far as to use language reminiscent of the Indian Commerce Clause, finding that Congress's power to regulate foreign commerce was "exclusive and plenary."[216]

Thus, when it comes to enacting federal tariffs,[217] import or export duties, [218] embargos, [219] or other trade-related federal activities, the Court has determined that Congress's power under the Foreign Commerce Clause is very broad. Indeed, "[n]o sort of trade can be carried on between this country and any other, to which this power does not extend."[220]

Importantly, and consistent with the thesis of this article, in the *Board of Trustees*, the Court did not impose the Interstate Commerce Clause (or the Indian Commerce Clause) legal framework on the Foreign Commerce Clause. This makes practical sense. For example, the Court has noted that Congress could enact an embargo related to foreign commerce, but could not enact an embargo related to interstate commerce.[221] In drawing this distinction between the foreign and

213. *Id.* at 56.

214. *Id.* ("The Tariff Act of 1922 is entitled, 'An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes.' The Congress thus asserted that it was exercising its constitutional authority 'to regulate Commerce with foreign Nations.'") (citations omitted).

215. Bd. of Trs. of Univ. of Ill. v. United States, 289 U.S. 48, 56 (1933) (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.)1, 193–94 (1824)).

216. *Bd. Of Trs. Of Univ. of Ill.*, 289 U.S. at 56; *see also infra* Part II.C (discussing the Indian Commerce Clause).

217. *See Bd. of Trs. of Univ. of Ill.*, 289 U.S. at 57 ("The Congress may determine what articles may be imported into this country and the terms upon which importation is permitted . . . . If the Congress saw fit to lay an embargo or to prohibit altogether the importation of specified articles . . . Congress may . . .") (citations omitted).

218. *See id.* at 58.

219. *See id.* at 57; *see also* Atl. Cleaners & Dyers v. United States, 286 U.S. 427, 434 (1932) (stating in dicta that the Congress has the power to enact embargos when regulating foreign commerce).

220. *Bd. of Trs. of Univ. of Ill.*, 289 U.S. at 56 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 193 (1824)).

221. *Atl. Cleaners & Dyers*, 286 U.S. at 434 (stating in dicta: "In the regulation of foreign

interstate commerce powers, the Court emphasized that congressional power under the Foreign Commerce Clause "may be broader than" under the Interstate Commerce Clause.[222]

ii. Conduct of U.S. Citizens who Travel in Foreign Commerce

Since the Court concluded in *Board of Trustees* that Congress's foreign commerce power is "exclusive and plenary,"[223] why advocate for a new legal framework for the Foreign Commerce Clause? Perhaps in the context of pure trade-related commercial transactions concerning foreign nations, such broad power makes sense because it allows the Nation to speak with one clear voice in its trade interactions with foreign nations. However, with recent globalization, a new issue has arisen—how broad is Congress's power under the Foreign Commerce Clause to regulate the behavior of U.S. citizens who have traveled to foreign nations? If the foreign commerce power was "exclusive and plenary," then in such situations Congress would have an all encompassing power which may allow, for example, the prohibition of a U.S. citizen from eating pasta in Italy. This outcome is surely not what the Founders had in mind, nor is it practical.

Lower courts agree. As discussed in this Section, when such issues have arisen, the lower courts have not entertained the notion that the Foreign Commerce Clause allows such boundless power over U.S. citizens abroad. A majority of the lower courts, however, swing too much in the opposite direction and impose the legal framework of the Interstate Commerce Clause on the Foreign Commerce Clause without considering the historical and precedential differences between the two.

What test, then, for laws with extraterritorial reach? Generally, there are three approaches that the lower courts have taken: (1) mechanically, without much explanation, apply the Interstate Commerce Clause framework as articulated in *Lopez*; (2) apply a new "tenable nexus" test; and (3) recognize that the Congress has broader power to regulate foreign commerce, but still apply the *Lopez* framework. This Article will analyze each approach to show that none of these approaches accurately analyzes the scope of Congress's power under the Foreign Commerce Clause.

Here is a chart that shows the diversity of the approaches that the lower courts have applied in their approach to Foreign Commerce Clause issues concerning laws with extraterritorial reach. For example,

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commerce an embargo is admissible; but it reasonably cannot be thought that, in respect of legitimate and unobjectionable articles, an embargo would be admissible as a regulation of interstate commerce, since the primary purpose of the clause in respect of the latter was to secure freedom of commercial intercourse among the states.").

222. *Id.*

223. *Bd. of Trs. of Univ. of Ill.*, 289 U.S. at 56.

not only is there a recent (in 2011) circuit split between the Third and Ninth Circuits, but within the circuits themselves different tests are being applied without explanation. As illustrated in the chart below, in the Third Circuit, *Pendleton* applies a different test than *Bianchi*, and in the Ninth Circuit, *Cummings* applies a different test than *Clark*. Each category of cases will be explained in turn.

| ***Approach to Foreign Commerce Clause Issues*** | ***Case (Court and Year)*** |
|---|---|
| 1. Mechanically applying the *Lopez* framework without explanation: | • *Cummings* (9th Cir. 2002)[224]<br>• *Schneider* (E.D. Pa. 2011)[225] |
| 2. Adopting a new "tenable nexus" test: | • *Bianchi* (3d Cir. 2010)[226]<br>• *Clark* (9th Cir. 2006)[227] |
| 3. Applying the *Lopez* framework, but recognizing Congress has broader power to regulate foreign commerce: | • *Pendleton* (3d Cir. 2011)[228]<br>• *Bredimus* (5th Cir. 2003)[229]<br>• *Martinez* (W.D. Tex. 2009)[230]<br>• *Flath* (E.D. Wis. 2012)[231] |

### *Approach #1: Mechanically Applying the* Lopez *Framework without explanation*

In *United States v. Cummings*,[232] the defendant challenged the constitutionality of the International Parental kidnapping Crime Act (IPKCA), which criminalizes the removal of "a child from the United States . . . with [the] intent to obstruct the lawful exercise of parental

224. United States v. Cummings, 281 F.3d 1046, 1049 (9th Cir. 2002), *cert. denied*, 537 U.S. 895 (2002).

225. United States v. Schneider, 817 F. Supp. 2d 586, 602 (E.D. Pa. 2011).

226. United States v. Bianchi, 386 F. App'x 156, 161–62 (3rd Cir. 2010), *cert. denied*, 131 S. Ct. 1044 (2011).

227. United States v. Clark, 435 F.3d 1100, 1114 (9th Cir. 2006), *cert. denied*, 549 U.S. 1334 (2007).

228. United States v. Pendleton, 658 F.3d 299, 308 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2771 (2012).

229. United States v. Bredimus, 352 F.3d 200, 204–08 (5th Cir. 2003), *cert. denied*, 541 U.S. 1044 (2004).

230. United States v. Martinez, 599 F. Supp. 2d 784, 805 (W.D. Tex. 2009).

231. United States v. Flath, 845 F. Supp. 2d 951, 955 (E.D. Wis. 2012).

232. United States v. Cummings, 281 F.3d 1046, 1047 (9th Cir. 2002).

rights."[233] Although the issue was raised as a Foreign Commerce Clause issue, the Ninth Circuit mechanically applied the *Lopez* Interstate Commerce Clause framework without any explanation as to why this framework should be applied.[234] Relying on *Lopez*, the Ninth Circuit concluded that IPKCA was a permissible exercise of congressional authority to regulate "the channels of foreign commerce."[235] The court focused on the fact that by "retaining" a child in a foreign country, the child is prevented from using the channels of foreign commerce (*e.g.*, a plane or some other means of transportation to travel back to the United States).[236] Interestingly, the Ninth Circuit also noted that "although not necessarily required, we note that IPKCA inherently contains a jurisdictional element that ensures that the wrongfully retained children passed through the channels of foreign commerce."[237] Thus, even though the Ninth Circuit may have applied the wrong test to this Foreign Commerce Clause issue, it did correctly note that one common theme between the Foreign and Interstate Commerce Clauses is that the U.S. Supreme Court favors statutes that articulate a jurisdictional nexus to commerce.[238]

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233. 18 U.S.C. § 1204(a) (2006).

234. *Cummings*, 281 F.3d at 1048–49. In explaining the rule, the Ninth Circuit first cited to well-known Interstate Commerce Clause cases, Heart of Atlantic Motel, Inc. v. United States, 379 U.S. 241, 253 (1964) and Wickard v. Filburn, 317 U.S. 111, 128–29 (1942). *See supra* notes 80–81, 95 and accompanying text (explaining these cases). The Ninth Circuit then set forth the three categories articulated in *Lopez* and concluded that IPKCA would be constitutional so long as it fell "into one of the delineated 'categories of activity that Congress may regulate under its commerce power.'" *Cummings*, 281 F.3d at 1049 (citing United States v. Lopez, 514 U.S. 549, 558 (1995)).

235. *Cummings*, 281 F.3d at 1050.

236. *Id.* The Ninth Circuit explained its channels of commerce analysis as follows:

> If a child is wrongfully retained in a foreign country, he or she cannot freely use the channels of commerce to return. Congress has authority to prevent individuals from impeding commerce . . . and, as to those who "retain" children outside of the United States, to prevent them from traveling back to this country via the channels of commerce. Thus, by wrongfully retaining his children in Germany, Cummings is interfering with the use of the channels of foreign commerce; IPKCA removes an impediment to travel and makes possible unrestricted use of the channels of commerce.

*Id.* (citations omitted).

237. *Id.* at 1051 ("Indeed, the *Lopez* statute's fatal flaw was that it contained 'no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affect[ed] interstate commerce.'") (citing *Lopez*, 514 U.S. at 561).

238. *See supra* Subsection II.A.4.

In recent cases, the PROTECT Act,[239] another federal statute regulating U.S. citizens' behavior abroad, has been repeatedly challenged under the Foreign Commerce Clause. The PROTECT Act allows for the prosecution of U.S. citizens who travel in foreign commerce and engage in "any illicit sexual conduct" with a minor.[240] There are two important statutory classifications to point out. First, "illicit sexual conduct" is either commercial or noncommercial in nature. [241] Second, under section 2423(b), the Act prohibits "travel in foreign commerce, *for the purposes of* engaging in any illicit sexual conduct;" and under section 2423(c), the Act prohibits "travel in foreign commerce, *and* engag[ing] in any illicit sexual conduct." Legislative history shows that section (c) was specifically amended to remove the intent requirement stated in section (b).[242] This distinction is important because under section (b) Congress is regulating the improper use of the means of foreign commerce[243]—traveling in the channels (like on a plane) with the improper purpose of engaging in illicit sexual conduct; while under section (c), Congress is regulating anyone who travels abroad, without any specific intent, and then after the travel is complete—and thus is no longer in the channels for foreign commerce—engages in illicit sexual conduct. As discussed in the next few cases, because section (c) does not involve the regulation of the means of foreign commerce, it has raised the most difficult issues concerning Congress's power under the Foreign Commerce Clause. To compound the difficulties, a section (c) conviction involving noncommercial sex acts with children (as opposed to commercial acts)

239. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-021, 117 Stat. 650 (codified as amended in scattered sections of 18 U.S.C.).

240. 18 U.S.C. § 2423(c) ("Engaging in illicit sexual conduct in foreign places. Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both."). Section (a) defines the protected "person" as a minor "who has not attained the age of 18." 18 U.S.C. § 2423(a).

241. 18 U.S.C. § 2423(f) provides:

> As used in this section, the term 'illicit sexual conduct' means (1) a sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A [18 U.S.C. §§ 2241(a)-(b), which encompasses non-commercial sexual abuse] . . . ; or (2) any commercial sex act (as defined in section 1591) with a person under 18 years of age.

242. Members of Congress were concerned that § 2423(b) would not adequately deter child-sex tourists because prosecutors had an "extremely difficult" time "proving intent in such cases." 148 Cong. Rec. 3884 (2002) (stating that intent is particularly "difficult to prove without direct arrangement booked through obvious child sex-tour networks."). Therefore, § 2423(c) was enacted.

243. *See infra* Section III.C of this Article (discussing the "means" of foreign commerce).

raises the issue of whether Congress is regulating commerce at all.

In *United States v. Schneider*, the district court upheld the conviction under section (b) of the PROTECT Act of a U.S. citizen who traveled to Russia with the intent to engage in noncommercial illicit sexual conduct with a young boy.[244] The district court, rejecting defendant's challenge that his conviction violated the Foreign Commerce Clause, found it was a proper regulation of the channels of commerce. [245] The district court relied on precedent that applied the *Lopez* Interstate Commerce Clause framework without any explanation as to why this framework should apply to a Foreign Commerce Clause issue. [246]

The problem with this approach is that it ignores the unique history of the Foreign Commerce Clause.[247] It also ignores the fact that the Court never explicitly or implicitly stated that the *Lopez* Interstate Commerce Clause framework (or the negative implications of it) should apply to the Foreign Commerce Clause.[248] Indeed, if anything *Japan Line* and *Board of Trustees* have shown that the Court is heading down a distinct path when such issues arise.[249] At the very least, courts should recognize the historical and precedential distinctions among the three commerce clauses and explain why they are adopting a certain approach.

***Approach #2: Adopting a New "Tenable Nexus" Test***

Although in the 2002 *Cummings* case, the Ninth Circuit took approach one (mechanically applying the *Lopez* Interstate Commerce Clause framework to the Foreign Commerce Clause), four years later, in *United States v. Clark,* the Ninth Circuit rejected "slavishly marching down the path of grafting the interstate commerce framework onto foreign commerce" and took "a global, commonsense approach."[250] In *Clark*, the defendant was convicted under the commercial prong of the PROTECT Act for paying to molest young boys in Cambodia. During the timeframe in which he molested the boys "on a regular basis,"

244. United States v. Schneider, 817 F. Supp. 2d 586, 602 (E.D. Pa. 2011).

245. *Id.* (finding § 2423(b) of the PROTECT Act a valid exercise of congressional authority under the Foreign Commerce Clause because it was upheld as constitutional under Congress's power to "regulate the use of the channels of *interstate* commerce") (emphasis added).

246. *Id.* (citing United States v. Tykarsky, 446 F.3d 458, 470 (3rd Cir. 2006) (upholding the conviction under Section (b) of the PROTECT Act because the defendant engaged in "interstate travel" by using the Internet, a "channel of interstate commerce," to attempt to induce a minor to cross state lines, from New Jersey to Pennsylvania, to engage in illicit sexual activity) (citing United States v. MacEwan, 445 F.3d 237, 245 (3rd Cir. 2006)).).

247. *See supra* Section II.B.

248. *See supra* Section II.A.

249. *See supra* Section II.B.

250. United States v. Clark, 435 F.3d 1100, 1103 (9th Cir. 2006) ("Instead of slavishly marching down the path of grafting the interstate commerce framework onto foreign commerce, we step back and take a global, commonsense approach to the circumstance presented here.").

defendant "primarily resided in Cambodia," but maintained some contacts with the United States, including an annual visit.[251] In upholding his conviction, the Ninth Circuit explicitly rejected applying the *Lopez* framework to a Foreign Commerce Clause challenge of the PROTECT Act, explaining that "forcing foreign commerce cases into the domestic commerce rubric is a bit like one of the stepsisters trying to don Cinderella's glass slipper."[252]

In rejecting the *Lopez* framework, the Ninth Circuit explained that "[a]s with the Indian Commerce Clause, the Foreign Commerce Clause has followed its own distinct evolutionary path."[253] In exploring this "distinct" path, the court made two observations. First, the Ninth Circuit recognized that the underlying federalism concerns of the Interstate Commerce Clause were absent: "Federalism and state sovereignty concerns do not restrict Congress's power over foreign commerce."[254] Second, the court noted that the Supreme Court was "unwavering" in finding the foreign commerce power to be broad and that there was "no counterpart to *Lopez* or *Morrison* in the foreign commerce realm that would signal a retreat from the Court's expansive reading of the Foreign Commerce Clause."[255]

With this in mind, the Ninth Circuit concluded that a distinct and new test should be applied to Foreign Commerce Clause issues: analyze the text of the statute "to discern whether it has a constitutionally tenable nexus with foreign commerce."[256] In applying this test to the PROTECT Act, the court concluded that the "nexus requirement [was] met to a constitutionally sufficient degree" because "[t]he combination of Clark's travel in foreign commerce [from the United States to Cambodia] and his conduct of an illicit commercial sex act in Cambodia shortly thereafter put[] the statute squarely within Congress's Foreign Commerce Clause authority."[257]

The Ninth Circuit, in passing, recognized its inconsistent analysis of the Foreign Commerce Clause noting that in *Cummings* it used the Interstate Commerce Clause legal framework to analyze whether IPKCA violated the Foreign Commerce Clause.[258] The Ninth Circuit,

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251. *Id.* at 1103.

252. *Id.* at 1116.

253. *Id.* at 1113.

254. *Id.*

255. *Id.*

256. *Id.* at 1114.

257. *Id.* at 1116–17.

258. *Id*. at 1116 (noting that in "previous decisions [we] have recognized that Congress legitimately exercises its authority to regulate the channels of commerce where a crime committed on foreign soil is necessarily tied to travel in foreign commerce, even where the actual use of the channels has ceased") (citing United States v. Cummings, 281 F.3d 1046, 1050–51 (9th Cir. 2002)); *see also supra* notes 235–38 and accompanying text (explaining

however, did not explain if *Clark* overruled *Cummings* or if *Clark* was distinguishable from *Cummings*. Thus, as it stands now, the Ninth Circuit has embraced two approaches to Foreign Commerce Clause issues: apply the *Lopez* framework or apply a tenable nexus test.

Inexplicably, the Third Circuit has also created this same confusion within its own circuit. In *Bianchi*[259] the Third Circuit upheld the constitutionality of both the commercial and noncommercial prongs of the PROTECT Act. In upholding the constitutionality of the commercial prong, the Third Circuit cited to *Clark*.[260] In upholding the constitutionality of the noncommercial prong of the PROTECT Act, the court concluded that the defendant "simply [had] not made the required 'plain showing that Congress has exceeded its constitutional bounds' by enacting that prong of the statute."[261] Although the court did not explicitly apply a tenable nexus test, the "plain showing" language required a similar analysis. Despite this analysis, a year later, in *Pendelton*, the Third Circuit applied the *Lopez* framework and found that the non-commercial prong of the PROTECT Act violated the Foreign Commerce Clause. The *Pendelton* court did not explain its reason for applying a different test or for its opposite holding in *Bianchi*. Indeed, the *Pendleton* court did not even mention *Bianchi*.[262]

Thus, both the Ninth and Third Circuits have applied the tenable nexus test (or as put in *Bianchi*, the "plain showing" test), even though different tests were later applied in other cases within the same circuit. This inconsistency suggests that courts are uneasy to apply this new test. Indeed, as the Third Circuit put it in*Pendelton*: "Although we agree with [the Ninth Circuit] that the Interstate Commerce Clause developed to address 'unique federalism concerns' that are absent in the foreign commerce context, we are hesitant to dispose of *Lopez's* 'time-tested' framework without further guidance from the Supreme Court."[263]

The *Pendelton* court is right; the tenable nexus is problematic. It suggests that by simply traveling to a foreign country by plane (or some other type of transportation—boat, train, car, etc.), a U.S. citizen has traveled in foreign commerce and, therefore, all subsequent conduct,

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*Cummings*).

259. *Bianchi* is "an extremely disturbing case involving a defendant who repeatedly traveled around the world to meet and engage in sexual conduct with young boys." United States v. Bianchi, 386 F. App'x 156, 157 (3rd Cir. 2010).

260. *Id.* at 161–62.

261. *Id.* at 162 (citations omitted).

262. *Bianchi* is an unpublished opinion; however, since it is a 2010 case, it may be relied on and cited. *See* FED. R. APP. P. 32.1(a) (providing that: "A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as 'unpublished', 'not for publication', 'nonprecedential', 'not precedent', or the like; and (ii) issued on or after January 1, 2007.").

263. United States v. Pendleton, 658 F.3d 299, 308 (3d Cir. 2011) (citation omitted),.

even noncommercial in nature, would be subject to federal regulation under the Foreign Commerce Clause. As Judge Ferguson observed in his dissent in *Clark*, "On some level, every act by a U.S. citizen abroad takes place subsequent to an international flight or some form of 'travel[ ] in foreign commerce.'"[264] This implication is sweeping and plainly ignores the principle of limited federal government.[265] Indeed, many scholars have critiqued the tenable nexus test as having no apparent limits.[266] While the Ninth Circuit is correct that applying the *Lopez* framework to the Foreign Commerce Clause cases is like "jamming a square peg into a round hole,"[267] any new test needs to set forth some limiting factors. The next section of this article attempts to do just that—articulate a new Foreign Commerce Clause legal framework that embraces historical origins and stays true to precedent, but also creates some practical limits. However, before setting forth this new legal framework, it is important to critique Third and Fifth Circuit cases which have rejected adopting any new test and, instead, have applied the *Lopez* framework despite acknowledging that Congress's power under the Foreign Commerce Clause is broader than under the Interstate Commerce Clause.

***Approach #3: Applying the Lopez Framework but recognizing Congress has broader power to regulate foreign commerce***

In a third group of cases, courts have explicitly recognized the distinctness of the Foreign Commerce Clause—namely, that it encompasses power broader than Congress's Interstate Commerce Clause power because of the lack of federalism and state sovereignty concerns. These courts, however, still decided to apply the *Lopez* framework. This approach has more merit than approach one (mechanically applying *Lopez*) because in these cases the court has at least acknowledged the distinct historical and precedential path of the Foreign Commerce Clause. This approach has also created the clearest expression of the circuit split concerning how to analyze Congress's Foreign Commerce Clause power to regulate U.S. citizens' conduct abroad.[268]

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264. United States v. Clark, 435 F.3d 1100, 1120 (9th Cir. 2006) (Ferguson, J., dissenting) (citations omitted).

265. *See, e.g.*, United States v. Bredimus, 352 F.3d 200, 204 (5th Cir. 2003) (explaining, as a "first principle[]," that "the Framers devised a federal government of limited and enumerated powers").

266. *See, e.g.*, Bolia, *supra* note 46, at 797; Buffington, *supra* note 46, at 841; Christensen, *supra* note 46, at 621; High, Jr., *supra* note 46, at 343; Hogan, *supra* note 46, at 641; Messigian, *supra* note 46, at 1241; Recent Case, *Ninth Circuit Holds That Congress Can Regulate Sex Crimes Committed by U.S. Citizens Abroad—United States v. Clark*, 119 HARV. L. REV. 2612 (2006).

267. *Clark*, 435 F.3d at 1103.

268. *See Pendleton*, 658 F.3d at 306–08.

In a recent case, *United States v. Pendleton*, the Third Circuit upheld the constitutionality of the noncommercial prong of the PROTECT Act under the Foreign Commerce Clause by applying the *Lopez* legal frame.[269] In *Pendleton*, the defendant, who sexually molested a young boy in Germany, challenged his conviction under the non-commercial prong of the PROTECT Act as an invalid exercise of congressional foreign commerce power. [270] Although the Third Circuit rejected the Ninth Circuit's new "tenable nexus" approach, [271] the Third Circuit conceded that the Supreme Court never expressly applied the Interstate Commerce Clause legal framework to the Foreign Commerce Clause: "The three-category framework outlined in *Lopez* and *Morrison* applies, on its face, to statutes enacted pursuant to the Interstate Commerce Clause. The Supreme Court has yet to determine whether this framework applies to cases involving Congress's power to regulate pursuant to the Foreign Commerce Clause."[272] The court also conceded that the test for the Foreign Commerce Clause had "its own distinct evolutionary path," [273] but noted that it was "used primarily [in the dormant Formant Commerce Clause context] as a tool to limit the ability of the several states to intervene in matters affecting international trade."[274]

Although the Third Circuit recognized that the scope of the foreign commerce power was distinct from and greater than the interstate commerce power, the court was hesitant to create a new test without clearer guidance from the Supreme Court.[275] Instead, the Third Circuit found that the noncommercial prong of the PROTECT Act was constitutional under the narrower *Lopez* standard, specifically the channels of commerce category,[276] and therefore it was not necessary to address the broad interpretation of the Foreign Commerce Clause.[277] In

269. *Id.*at 308.

270. *Id.* at 302.

271. *Id.* at 307–08.

272. *Id.* at 306.

273. *Id.* at 306 (citing United States v. Clark, 435 F.3d 1100, 1113 (9th Cir. 2006)).

274. *Pendleton,* 658 F.3d at 306. The Third Circuit explained: "Although jurisprudence on the so-called 'dormant' Foreign Commerce Clause is well-developed, '[c]ases involving the reach of . . . congressional authority to regulate our citizens' conduct abroad are few and far between.'" *Id.* at 307 (citing United States v. Clark, 435 F.3d 1100, 1102 (9th Cir. 2006).

275. *Pendleton*, 658 F.3d at 308 ("Although we agree with *Clark* that the Interstate Commerce Clause developed to address 'unique federalism concerns' that are absent in the foreign commerce context, we are hesitant to dispose of *Lopez's* 'time-tested' framework without further guidance from the Supreme Court.") (citation omitted).

276. *Id.* The Third Circuit observed: "Unlike Congressional authority to regulate activities affecting interstate commerce under the third category in *Lopez*, Congress's authority to regulate the *channels* of commerce is not confined to regulations with an economic purpose or impact." *Id.* (emphasis in original).

277. *Id.* ("[W]e need not reach the fundamental question of whether the Supreme Court

finding the PROTECT Act to be a valid exercise of the foreign commerce power, the Third Circuit also noted as important that the statute had an "express" jurisdictional statement that tied it to "Congress's power under the Foreign Commerce Clause."[278] Thus, *Pendelton* is another example showing the importance of a statute explicitly setting forth a jurisdictional hook to a commerce clause power.[279]

By rejecting *Clark*'s new "tenable nexus" test, not only did *Pendleton* create a circuit split with the Ninth Circuit, but it also created confusion within the Third Circuit itself. The year before *Pendleton*, in *Bianchi*, the Third Circuit contradictorily applied a "plain showing" test to find the non-commercial prong of the PROTECT Act constitutional under the Foreign Commerce Clause. [280] The *Pendleton* court made no effort to address the reasons for two different tests or even to cite to *Bianchi*. Such imprecision again illustrates the courts' confusion concerning the foreign commerce power over U.S. citizens' conduct abroad.

Like the Third Circuit, the Fifth Circuit in *Bredimus* recognized that Congress's foreign commerce power is broader than its Interstate Commerce Clause power, but still opted to apply the *Lopez* framework to a Foreign Commerce Clause issue. [281] Specifically, in *Bredimus* the Fifth Circuit affirmed a conviction under the PROTECT Act because the defendant traveled in foreign commerce "for the purpose of 'engaging in illicit sexual conduct'"[282] (e.g., taking photos of young Thai children "engaged in sexually explicit conduct"[283]). In upholding the statute, the *Bredimus* court noted that "[t]he Supreme Court has long held that Congress's authority to regulate foreign commerce is even broader than its authority to regulate interstate commerce. . . . [A] court should allow Congress greater deference in regulating the channels of foreign commerce."[284] Despite this recognition of broad Foreign Commerce Clause power, the Fifth Circuit applied the Interstate Commerce Clause test—in particular the channels of commerce category—to find the PROTECT Act constitutional.[285] Thus, both the

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will adopt the Ninth Circuit's broad articulation of the Foreign Commerce Clause because, as we shall explain, § 2423(c) [the PROTECT Act] is a valid congressional enactment under the narrower standard articulated in *Lopez*.").

278. *Id.* at 311 (citing United States v. Morrison, 529 U.S. 598, 612 (2000)).

279. *See supra* Section II.A.

280. United States v. Bianchi, 386 F. App'x 156, 162 (3rd Cir. 2010). *See also supra* notes 260–63 and accompanying text (explaining *Bianchi*).

281. United States v. Bredimus, 352 F.3d 200, 204–08 (5th Cir. 2003).

282. *Id.* at 204.

283. *Id.* at 202.

284. *Id.* at 208 (citing Japan Line, Ltd. v. Cnty. of Los Angeles, 441 U.S. 434, 448 (1979)).

285. *Bredimus*, 352 F.3d at 205–06.

Third and Fifth Circuits have recognized the differences underlying the Foreign Commerce Clause, but, instead of adopting a new test like the Ninth Circuit did in *Clark*, the Third and Fifth Circuits have applied the *Lopez* legal framework. At least two district courts have adopted this same approach.[286]

In sum, the Court has addressed certain aspects of the Foreign Commerce Clause. The Court has developed a one voice test for the dormant Foreign Commerce Clause and has referred to Congress's broad power to enact federal legislation concerning trade with foreign nations. While these two tests are distinct from the Interstate Commerce Clause framework, when a federal statute with extraterritorial reach has been challenged these same courts oddly applied the Interstate Commerce Clause framework to the Foreign Commerce Clause. Other courts created a new "tenable nexus" test. Indeed, the courts are all over the board, even contradicting themselves within their own circuits.[287] None of the courts, however, have applied a legal framework that makes sense. The *Lopez* three-category framework does not work because it embodies state sovereignty concerns—unique concerns that are irrelevant to the Foreign Commerce Clause.[288] Moreover, the new "tenable nexus" has no apparent limits.

Thus, the current legal landscape of the Foreign Commerce Clause is in disarray. There is a plenary power test applied to laws that regulate trade with foreign nations, and nothing but confusion as to what test applies to laws with extraterritorial application. This article proposes that there should be one workable legal framework applicable in both situations. The remainder of this article considers what that legal framework should be.

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286. *See* United States v. Martinez, 599 F. Supp. 2d 784, 802–08 (W.D. Tex. 2009) (applying the *Raich* analysis to conclude that a U.S. citizen who engaged in noncommercial sex acts with children abroad could be prosecuted under the PROTECT Act without violating the Foreign Commerce Clause) (citing Gonzales v. Raich, 545 U.S. 1, 9–22 (2005)). For an analysis of *Raich*, *see supra* notes 119–25 and accompany text. *See also* United States v. Flath, 845 F. Supp. 2d 951, 955 (E.D. Wis. 2012) (applying the "*Lopez* factors" to a Foreign Commerce Clause challenge with the distinctions that "Congress has broader power to regulate commerce with foreign nations than among states" and "the interplay of federalism and state sovereignty, so prevalent in the interstate commerce context, is absent in the foreign commerce arena").

287. In the Third Circuit, the court applies a different test in *Pendleton* than it does in *Bianchi*. In the Ninth Circuit, the court applies a different test in *Cummings* than it does in *Clark*. *See supra* notes 225–29 and accompanying text.

288. This conclusion is where Colangelo and I disagree. *See supra* note 49 (discussing differences between this Article's and Colangelo's approach, the latter of which assumes that the Interstate Commerce Clause framework should be imposed onto the Foreign Commerce Clause).

### C. *Option #3: The Indian Commerce Clause Legal Framework—Too Unique*

While a majority of courts have been willing to superimpose the legal framework of the Interstate Commerce Clause onto the Foreign Commerce Clause,[289] no court has entertained the notion that the Indian Commerce Clause legal framework should be applied to the Foreign Commerce Clause. This dichotomy—analyzing the Foreign Commerce Clause using the Interstate Commerce Clause framework, but not the Indian Commerce Clause framework—is particularly interesting since, as a matter of pure text, the Indian and Foreign Commerce Clauses share more of the same language (for example, Congress can regulate commerce "*with* foreign Nations" and "*with* the Indian Tribes" as opposed to "*among* the several States").[290] So why not use the Indian Commerce Clause legal framework?

To answer this question, this Section first briefly summarizes the history and the legal landscape of the Indian Commerce Clause. Many thoughtful scholars debate whether the current legal test is correct.[291] Again, that debate is beyond the scope of this Article. The only reason this Article explores the development of the Indian Commerce Clause legal framework is to scrutinize whether it makes sense to apply that framework to the Foreign Commerce Clause. As this section concludes, because Congress's power under the Indian Commerce Clause reflects the unique relationship between the federal government and the Indian tribes (much as the Interstate Commerce Clause reflects the unique relationship between the federal government and the states), it does not make sense to use that same framework in the foreign commerce context.

#### 1. History

Prior to the Constitutional Convention, there was "chaos in the management of Indian affairs."[292] Some states were unilaterally

289. *See supra* Subsection II.B.2 (discussing the current legal landscape of the Foreign Commerce Clause).

290. U.S. CONST. art. 1, § 8, cl. 3 (emphasis added). See *infra* Section III.C further exploring this textual difference.

291. *See, e.g.*, Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause,* 85 DENV. U. L. REV. 201 (2007) (rejecting that the Indian Commerce Clause gives Congress plenary power); Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1069 (2004) (arguing that "the federal government's power over individual Indian tribes varies from tribe to tribe"); Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 170 (2002) (rejecting Congress's plenary power over Indian Tribes); Nathan Speed, Note, *Examining the Interstate Commerce Clause Through the Lens of the Indian Commerce Clause*, 87 B.U. L. REV. 467, 470–71 (2007) (arguing for a narrow interpretation of the Indian Commerce Clause).

292. Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055,

engaging in hostilities with Indian tribes, and others protested that certain national treaties with Indian tribes constituted an "incursion on state sovereignty."[293] Going into the Constitutional Convention, there was agreement among the Founders that the "control of Indian affairs" needed to be vested in a centralized national government.[294] Madison originally drafted a clause that allowed Congress to "regulate affairs with the Indians."[295] This clause was later added to the existing Commerce Clause and re-stylized by replacing the word "affairs" with "commerce."[296] No record of debate accompanies the textual change.[297] After doing an in-depth historical analysis of the Indian Commerce Clause, one scholar concluded that the intent of the Framers was clear—the "national government [should have] full and complete power to manage all affairs and trade with the Indian tribes," and "the sovereignty of the Indian tribes as peoples [was] separate from the states [as] evident in their enumeration among the states and foreign nations in the Commerce Clause."[298] History, therefore, shows that the Framers viewed the Indian tribes as separate entities with distinct concerns. Thus, although in the final version of the Commerce Clause "[t]o regulate Commerce" is shared among all three groups (states, foreign nations, and Indian tribes),[299] the Framers saw the Indian tribes as a distinct group having a unique relationship with the federal government.

### 2. Current Legal Landscape

Precedent reflects this historical development. In determining the broad scope of the Indian Commerce Clause, the Supreme Court has consistently considered the distinct relationship between Congress and the Indian tribes. In 1831, in *Cherokee Nation v. Georgia*, the Court explained that Indian tribes are akin to foreign nations because they are sovereign, but unique because they are physically located in the United States.[300] Thus, early on the Court recognized Indian tribes as a separate

1147 (1995).

293. *Id.*

294. *Id.*

295. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 321, 324 (Max Farrand ed., rev. ed. 1966).

296. *Id.* at 143, 493.

297. Clinton, *supra* note 293, at 1157 ("While the meaning of the Indian Commerce Clause and the intent of the framers seems reasonably clear, it is remarkable that the clause provoked so little debate or overt attention at the Constitutional Convention.").

298. *Id.* at 1164.

299. U.S. Const. art. I, § 8, cl. 3.

300. 30 U.S. (5 Pet.) 1, 17 (1831) ("Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, . . . yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations.").

classification from foreign nations. The Court labeled the Indian tribes as "domestic dependent nations" and determined that "[t]hier relation to the United States resembles that of a ward to his guardian."[301]

*United States v. Kagama*[302] signified a major application of this "ward" theory.[303] In *Kagama*, the Court considered the constitutionality of the Major Crimes Act of 1885,[304] a statute that allowed for the federal prosecution of Native Americans who committed certain crimes on Indian Territory. The Court rejected the government's argument that the Act was constitutional under the Indian Commerce Clause, finding this argument "a very strained construction" of the Constitution.[305] Instead, the Court looked outside the Constitution and found the Act valid under the "wards of the nation" theory focusing on the relationship between the Indian tribes and the federal government.[306]

Later, however, the Court brought such issues back to the Constitution and explicitly stated that Congress's plenary power over the Indian tribes arose from the Indian Commerce Clause—sometimes in conjunction with the Treaty Clause,[307] and other times on its own.[308] As recently as 2004, in *United States v. Lara*, the Court explained that

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301. *Id.*

302. 118 U.S. 375 (1886).

303. *Id.* at 383–84.

304. Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153 (2006)). Under this Act, Native Americans can be prosecuted for such crimes as murder, kidnapping, incest, felony child abuse, burglary, and robbery that take place wholly on an Indian Reservation against another Native American or non-Native American. *Id.* § 1153(a).

305. *Kagama*, 118 U.S. at 378.

306. The Court described this unique relationship as follows:

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive, and by Congress, and by this court, whenever the question has arisen.

*Id.* at 383–84 (emphasis in original).

307. U.S. Const. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . ."); *see also* McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973) ("The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making.").

308. *See, e.g.*, Cotton Petroleum v. New Mexico, 490 U.S. 163, 192 (1989) (explaining that the "central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs").

"the Constitution grants Congress broad general powers . . . described as 'plenary and exclusive,'" a source of which the "Court has traditionally identified [in] the Indian Commerce Clause."[309] In describing the Indian Commerce Clause framework in this way, the Court again pointed out that the Indian tribes, as "dependent sovereign[s] that [are] not [] State[s]," have a distinct and unique history with the federal government.[310] Simply put, when analyzing the constitutionality of federal regulation of Indian tribes, the Court has developed "canons of construction applicable in Indian law [that] are rooted in the unique trust relationship between the Unites States and the Indians."[311]

3. Legal Framework Inapplicable to the Foreign Commerce Clause

History and precedent show that Congress's plenary power over Indian tribes stems from its special relationship with them. Given that the Indian Commerce Clause test reflects the unique "dependent sovereign"[312] relationship the Indian tribes have with the federal government, it does not make sense to superimpose this framework onto the Foreign Commerce Clause. Indeed, the early Court flat-out rejected analogizing Indian tribes to foreign nations.[313] For example, the Court has upheld Congress's right to regulate conduct of Native Americans inside Indian Territory.[314] Foreign national sovereignty concerns, however, would prevent Congress from regulating the conduct of a Cuban inside Cuba.[315] Moreover, in discussing the scope of the Indian Commerce Clause, the Court has not relied on or analyzed the Foreign Commerce Clause.[316] Thus, the Indian Commerce Clause legal

309. 541 U.S. 193, 200 (2004).

310. *Id.* at 203.

311. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985).

312. *Lara*, 541 U.S. at 200, 202–03.

313. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (explaining that Indian tribes should not be "denominated [as] foreign nations").

314. *See, e.g.*, United States v. Kagama, 118 U.S. 375, 383–84 (1886) (allowing Native Americans to be federally prosecuted for committing certain crimes against another Native Americans in Indian Territory).

315. *See infra* Part III.B (discussing foreign national sovereignty issues).

316. When the Court mentions foreign nations, it does so only to highlight the difference with Indian tribes. *See, e.g.*, *Cherokee Nation*, 30 U.S. (5 Pet.) at 17. In 1876, however, the early Court, in dicta, suggested that the Indian Commerce Clause power was as broad as the Foreign Commerce Clause power: "Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes,—a power as broad and free from restrictions as that to regulate commerce with foreign nations." United States v. 43 Gallons of Whiskey, 93 U.S. 188, 194 (1876) (upholding a federal law prohibiting the sale of alcohol in Indian Territory). Importantly, in this one passing reference, the Court did not explore the depth of the foreign commerce power, and, as reflected by current jurisprudence, the Court continues to struggle with the depth of the Indian commerce power.

framework should not be, and has not been, superimposed onto the Foreign Commerce Clause.

### 4. Relevant Themes

While it does not make sense to apply the Indian Commerce Clause structure in the foreign commerce context, two important inferences emerge. First, the historical development and legal analysis of the Indian Commerce Clause is perhaps the strongest evidence that there are three distinct commerce clauses. As the Court succinctly put it:

> The objects, to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian Tribes. When forming this article, the convention considered them as entirely distinct." In fact, the language of the Clause no more admits of treating Indian tribes as States than of treating foreign nations as States.[317]

The distinct development of the legal framework for the Indian and Interstate Commerce Clauses illustrates that the tests for each group (states, Indian tribes, and foreign nations) should be different from each other.

Second, when considering how to articulate the test for each commerce clause, it is important to consider the relationship each group has with the federal government. The Court has specifically recognized the "very different applications" of the Interstate and Indian Commerce Clauses, commenting that the power to regulate interstate commerce "is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause."[318] Likewise, the Court has observed that "[t]he principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce."[319] Thus, while the Interstate, Indian, and Foreign Commerce Clauses are in parallel phrases in the Constitution, history and precedent justify a different reading of each clause based upon the type of relationship with the federal government.

In sum, the Indian Commerce Clause legal framework has developed from the unique relationship between the Indian tribes and the federal government. This likely explains why lower courts, when confronted with the reach of Congress's Foreign Commerce Clause power to

317. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) (citing *Cherokee Nation*, 30 U.S. (5 Pet.) at 18).

318. *Id.* at 192 (1989).

319. Bd. of Trs. of Univ. of Ill. v. United States, 289 U.S. 48, 57 (1933).

regulate the conduct of U.S. citizens abroad, have not imposed the framework of the Indian Commerce Clause onto the Foreign Commerce Clause. That, of course, begs the question as to why these same courts apply the Interstate Commerce Clause structure when analyzing Congress's foreign commerce power;[320] they do so without any recognition as to the unique relationship the federal government has with states. Such concerns are absent in the relationship that the federal government has with foreign nations. Thus, although the legal framework of the Foreign Commerce Clause is in disarray, neither the legal framework of the Interstate or Indian Commerce Clauses work for the Foreign Commerce Clause. The remainder of this Article, therefore, contemplates what factors courts and Congress might consider when confronted with the scope of Congress's foreign commerce power, particularly when confronted with challenges to federal laws that have extraterritorial application.

## III. FACTORS TO CONSIDER FOR THE LEGAL FRAMEWORK OF THE FOREIGN COMMERCE CLAUSE

How far does Congress's power under the Foreign Commerce Clause reach? Should Congress's foreign commerce power[321] allow it to pass extraterritorial laws that prohibit U.S. citizens from engaging in conduct while traveling abroad, when that conduct is legal in the foreign country? Does the mere act of buying a plane ticket mean that a U.S. citizen has entered the channels of foreign commerce and thus every subsequent action abroad is subject to regulation by Congress under the Foreign Commerce Clause? As discussed above, lower courts are split on how to answer these questions. The majority of courts simply apply the legal framework of the Interstate Commerce Clause, which fails to acknowledge the unique relationship the federal government has with foreign nations.[322] Other lower courts have created a new "tenable nexus" test with no apparent limits.[323] The purpose of this Section is to lay out some factors that courts should consider when determining the scope of Congress's foreign commerce power.

This Article does not attempt to use any particular constitutional interpretive methodology; controversies concerning such methodologies[324] are beyond the scope of this Article. The goal of this

320. *See supra* Parts II.A–B.

321. There might be other sources of the Constitution which may allow Congress to enact such laws. *See, e.g.*, *supra* Part I.B (discussing different Constitutional sources for federal laws with extraterritorial application). Such a discussion, however, is beyond the scope of this Article.

322. *See supra* Part II.B.

323. *Id.*

324. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES

Article is more modest. This Article considers history, precedent (domestic and international), structure, and text in order to begin a conversation[325] concerning the scope of the Foreign Commerce Clause.[326]

### A. *First Principles: Broad Power in Light of a Limited Government*

Given the history and jurisprudence of the Foreign Commerce Clause, an argument might be made that Congress's power under the Foreign Commerce Clause is virtually limitless. When trade with other nations is at issue, the Court, relying on the "one voice" test, has historically treated Congress's foreign commerce power as broader than the interstate commerce power.[327] That raises many interesting issues concerning the scope of Congress's foreign commerce power. For example, under the Interstate Commerce Clause, Congress has enacted over three thousand criminal laws and massive educational regulations.[328] Given that Congress has broader power under the Foreign Commerce Clause, what are the limits? Could Congress enact criminal laws under the Foreign Commerce Clause that regulate all criminal activities by U.S. citizens in foreign nations?

A framework that recognizes no limits on the Foreign Commerce Clause is problematic. It violates the notion that the Constitution is structured to limit Congress's power. When confronted with Commerce Clause issues, courts often "start with first principles."[329] The first of

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§ 1.4 (3d ed. 2006) (discussing the debate of constitutional interpretive theories); RICHARD H. FALLON, JR., THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW 16–17 (2004) (same).

325. *See supra* Part I.A (discussing international law); *supra* Part II.B (discussing the history and precedent of the Foreign Commerce Clause); *infra* Part III.C (discussing textual considerations).

326. *See, e.g.*, Colangelo, *supra* note 39, at 975 ("And, as a matter of practice, '[m]ore often than not, the Court relies on a variety of interpretive techniques in reaching its decision[, including] . . . text, original understanding, structure, precedent, and doctrine in order to reach a particular result. As such, the holding is essentially a result of the sum of these parts.' ") (brackets in original) (citing LACKLAND H. BLOOM, JR., METHODS OF INTERPRETATION: HOW THE SUPREME COURT READS THE CONSTITUTION xviii–xix (2009)); *see also* J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 858–60 (2007) (describing consensus among different interpretive methods).

327. *See supra* Part II.B.2.

328. *See* Robert J. Pushaw, *Does Congress Have the Constitutional Power to Prohibit Partial-Birth Abortion?*, 42 HARV. J. ON LEGIS. 319, 332 (2005) (citing to TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, CRIMINAL JUSTICE SECTION A.B.A., THE FEDERALIZATION OF CRIMINAL LAW 2, 5–14 (1998); 20 U.S.C. §§ 1–9413 (2000)).

329. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012); United States v. Lopez, 514 U.S. 549, 551 (1995); United States v. Ho, 311 F.3d 589, 596 (5th Cir. 2002).

these "first principles" is that the Founders meant for the Constitution to "ensure protection of our fundamental liberties."[330] The Constitution therefore states explicitly that Congress is vested with "[a]ll legislative Powers herein granted."[331] By implication, then, there are powers not granted to Congress in the Constitution, which means that the federal government "possesses only limited powers; the States and the people retain the remainder."[332] Importantly, "the people" retain civil liberties.[333]

As such, while the Commerce Clause expressly grants Congress the power "[t]o regulate Commerce with foreign Nations,"[334] there are implied limits to this enumerated power.[335] As Chief Justice Roberts recently put it, the Constitution does not grant "general authority to perform all the conceivable functions."[336] Anything different "is not the country the Framers of our Constitution envisioned."[337] One scholar has concluded that "foreign affairs activities are [not] exempt from this proposition."[338] Lower courts have thus correctly recognized limits to the foreign commerce power when analyzing the constitutionality of laws with extraterritorial application.[339] Therefore, while the scope of

330. *Ho*, 311 F.3d at 596.

331. U.S. CONST. art. I, § 1.

332. *Sebelius*, 132 S. Ct. at 2577.

333. In a case involving Congress's delegation of power to the President over foreign affairs, the Court has suggested that the notion of "enumerated powers[] is categorically true only in respect of our internal affairs." United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 316 (1936). *Curtiss-Wright*, however, did not concern the Foreign Commerce Clause. *See id.* at 312–16. Thus, this reference "does not establish that the Foreign Commerce Clause has no meaning or is without bounds." United States v. Clark, 435 F.3d 1100, 1109 n. 14 (9th Cir. 2006). Furthermore, this reference in *Curtiss-Wright* addresses the notion that states lack foreign affairs power; it does not concern congressional power to enact laws with extraterritorial application that impact the liberties of U.S. citizens. Indeed, courts have criticized *Curtiss-Wright*'s proposition in such circumstances. *See, e.g.*, *Curtiss-Wright*, 299 U.S. at 316; United States v. Butenko, 494 F.2d 593, 602–03 (3d Cir. 1974) (noting that the "ramifications of *Curtiss-Wright*, however, remain somewhat enigmatic," but also noting that it is clear that the executive branch "cannot ignore the admonitions of the Fourth Amendment when investigating criminal activity unrelated to foreign affairs").

334. U.S. CONST. art. 1, § 8, cl. 3.

335. As discussed in Section I.A, this notion is reflected in the Interstate Commerce Clause jurisprudence which recognizes that, even though the commerce power is broad, there is some limit. *See supra* Section II.A.4. (discussing relevant themes in Interstate Commerce Clause cases that might influence the legal framework of the Foreign Commerce Clause).

336. *Sebelius*, 132 S. Ct. at 2577.

337. *Id.*

338. Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 335 (2001).

339. *See supra* Part II.B.2.b. Moreover, when considering the test for the dormant Foreign Commerce Clause, the U.S. Supreme Court explicitly recognized some limits as well. *See supra* Part II.B.2.a (discussing limits to the dormant Foreign Commerce Clause as articulated in *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159 (1983)).

the Foreign Commerce Clause is undoubtedly broad, as a matter of first principles, the legal framework should create some limits. What are those limits?[340] As discussed in the next sections, history, jurisprudence, and textual considerations provide some guidance in answering this question.

### B. *History and Jurisprudence: Distinct Framework*

Another common and relevant theme that emerges from the history and jurisprudence of the Interstate and Indian Commerce Clauses is that the legal framework of each clause reflects the distinct type of relationship that the group shares with the federal government. For the Interstate Commerce Clause, the Court has created the *Lopez* three-category framework reflecting state sovereignty concerns.[341] For the Indian Commerce Clause, the Court has allowed Congress to have broad power reflecting the unique status of Indian tribes as "dependent sovereigns."[342] By analogy, the legal framework of the Foreign Commerce Clause should reflect the type of relationship that foreign nations have with the federal government.

What type of a relationship does a foreign nation have with Congress? The short answer is: one in which the United States can speak with one voice,[343] while also cognizant of foreign sovereignty matters. While the meaning of the term foreign sovereignty is in flux,[344]

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340. While this Article suggests a legal framework that provides some limits on the foreign commerce power, it is interesting to think about a limitless power. If Congress did have limitless plenary power to regulate all U.S. citizens' conduct abroad, it might be argued that the Bill of Rights would provide the only constraint. For example, one might argue that under an inexhaustible foreign commerce power, Congress could enact laws prohibiting a U.S. citizen from littering in France, but Congress would not be allowed to prohibit a U.S. citizen from engaging in a protest in China if it violated that citizen's free speech rights. A major problem, however, is that it is not always clear when, and if, the Bill of Rights protects a U.S. citizen who engages in conduct abroad. *See, e.g.*, United States v. Behety, 32 F.3d 503, 510 (11th Cir. 1994) (explaining that "[t]he Fourth Amendment is generally inapplicable to actions carried out by foreign officials in their own countries enforcing their own laws, even if American officials are present and cooperate in some degree"). Thus, advocating for a limitless foreign commerce power might simply give Congress complete unbridled power—a government not envisioned by the Founders or supported by the notion of separation of powers or a limited federal government.

341. *See supra* Part II.A.

342. United States v. Lara, 541 U.S. 193, 203 (2004); *see also supra* Part II.C.

343. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 451 (1979); *see also supra* Part II.B (discussing the one voice test).

344. *See, e.g.*, W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 872 (1990). As Professor Reisman explains: "International law is still concerned with the protection of sovereignty, but, in its modern sense, the object of protection is not the power base of the tyrant . . . but the continuing capacity of a population freely to express and effect choices about the identities and policies of its governors." *Id.* Thus, for example, "[t]he Chinese Government's massacre in Tiananmen Square to maintain an oligarchy against the wishes of the people was a violation of Chinese

it at least reflects the notion that one country cannot legislate for another without consent. As the Court noted nearly two hundred years ago, "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute."[345] As another court recently noted, "Unlike the states, foreign nations have never submitted to the sovereignty of the United States government nor ceded their regulatory powers to the United States."[346] Therefore, by way of example, a U.S. federal law prohibiting a Cuban from smoking Cuban cigars inside Cuba (or inside any country other than the U.S.) would be unenforceable. This concern for foreign sovereignty "is [now principally] a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution[,]"[347] which makes it a matter related more to the foreign affairs doctrine than to constitutional scrutiny.[348]

Professor Colangelo, however, rightly concludes that because of foreign sovereignty concerns, the Foreign Commerce Clause "does not establish federal supremacy over the power of foreign nations."[349] Absent some treaty to the contrary, Colangelo explains, "foreign nations never surrendered their sovereignty to the federal government."[350] On the other hand, both Indian tribes and the states have done so. Thus, unlike Indian tribes and states, Congress "has no delegated power . . . to prescribe general rules for international commerce *among* and *inside* the nations of the world."[351] Colangelo is correct that the legal framework of the Foreign Commerce Clause should manifest respect for these unique foreign sovereignty concerns.[352]

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sovereignty." *Id.*

345. The Schooner Exch. v. McFaddon, 11 U.S. 116, 136 (1812).

346. United States v. Yunis, 681 F. Supp. 896, 907 n.24 (D.D.C. 1988), *aff'd*, 924 F.2d 1086 (D.C. Cir. 1991).

347. Verlinden B.V. v. Ctr. Bank of Nigeria, 461 U.S. 480, 486 (1983).

348. *Id.* ("Accordingly, this Court consistently has deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities."); *see also, e.g.*, the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330 et seq. (2006) (providing generally that foreign nations are immune from being sued in the United States unless one of its many exceptions apply).

349. Colangelo, *supra* note 40, at 1021.

350. *Id.* at 980.

351. *Id.* at 1021–22 (emphasis added).

352. In this regard, Colangelo is correct; because Congress cannot regulate non-U.S. citizens' conduct in other countries, Congress's foreign commerce clause power is "in some respects weaker than its powers to regulate domestically." *Id.* at 954. For example, as explained in *Gonzales v. Raich*, 545 U.S. 1, 16, 19 (2005), under the Interstate Commerce Clause a U.S. citizen in California consuming homegrown marijuana (complete intrastate activity) is subject to federal regulation; but, a "Dutchman enjoying his homegrown marijuana in the Netherlands need not be worried" about U.S. federal regulation. Colangelo, *supra* note 39, at 1022. Although Colangelo recognizes this difference between Congress's interstate and foreign commerce power, he superimposes the legal framework of the Interstate Commerce Clause onto the

Colangelo's treatment of the Foreign Commerce Clause, however, misses an important point. When a U.S. citizen engages in activity involving commerce in a foreign county, the United States, by extension of its citizenship, also engages in commerce with a foreign nation. Under international law's jurisdictional nationality principle, it is well-established that Congress can regulate the conduct of a U.S. citizen who travels in another foreign territory without infringing upon the other nation's sovereignty;[353] and, indeed, there are numerous federal laws with such extraterritorial application.[354]

In sum, there are two principles underlying the Foreign Commerce Clause. A Foreign Commerce Clause legal framework should empower the United States to speak with one voice in foreign matters and, at the same time, respect the sovereignty of foreign nations. Moreover, the legal framework permits Congress to regulate the conduct of U.S. citizens in foreign countries. But, given that the federal government has limited power, there must be some limit to the scope of that power. The tricky question is how to establish a framework that reflects these two principles. The text of the Foreign Commerce Clause gives some guidance.

### C. *Textual Considerations*

While each of the three groups—states, foreign nations, and Indian tribes—each have a unique relationship with the federal government,[355] they are all preceded by the same phrase "to regulate commerce."[356] As a matter of syntax, it seems logical to ascribe the same meaning of the phrase across the clauses. Chief Justice Marshall explained: "[C]ommerce, as the word is used in the constitution, is a unit . . . . [I]n its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it."[357] Leading scholars concur that there is "the presumption of intrasentence uniformity" that the phase "to regulate commerce" has the same meaning whether among states, with foreign nations, or with Indian tribes.[358]

While the phrase, "to regulate commerce" should be uniformly applied, it does not mean that the regulations have to be the same with each distinct group. Consider this sentence as an example: "A

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Foreign Commerce Clause—a major point where Colangelo's approach and this Article diverge.

353. *See supra* Part I.A (discussing the nationality principle under international law).

354. *See infra* Appendix A.

355. *See supra* Part II.

356. U.S. CONST. art. I, § 8, cl. 3.

357. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194 (1824).

358. Prakash, *supra* note 46, at 1150; *see also* Balkin *supra* note 52, at 15; Vermeule, *supra* note 51, at 1178 (agreeing "with Prakash's presumption of intrasentence uniformity," but disagreeing this means there is only one commerce clause).

corporation can regulate the interactions between its employees, with its subsidiaries, and with other companies." The sentence insinuates one action (regulating interactions), but with three different categories of regulations. Regulations governing the employees (like requiring employees to take sexual harassment training) would be different than those governing subsidiaries, which would be different than those governing relationships with other companies (where one corporation could not require another company's employees to take sexual harassment training). Likewise, while "the power to regulate commerce is conferred by the same words of the commerce clause with respect both to foreign commerce and interstate commerce," that "power when exercised in respect of foreign commerce may be broader than when exercised as to interstate commerce."[359] As one scholar aptly explained, "[T]he same set of words might have different effects in combination with different words in the same sentence, so that to 'regulate commerce *with*' might not mean the same thing as to 'regulate commerce *among*.' "[360] To unravel these textual issues, this section of the Article reviews the current debate of the meaning of first "to regulate commerce" and then "with foreign Nations."

### 1. "to regulate Commerce"

The phrase "to regulate" did not significantly garner the attention of the Court until *Sebelius*, the recent Obamacare case. Writing for the majority of a divided Court, Chief Justice Roberts explained that "[t]he Framers gave Congress the power to *regulate* commerce, not to *compel* it."[361] "[T]o *regulate* commerce presupposes the existence of commercial activity to be regulated."[362] Based on this definition, Roberts concluded that the provision mandating individuals to procure insurance was unconstitutional under the Interstate Commerce Clause because Congress did not have the power to "compel individuals not engaged in commerce to purchase an unwanted product."[363] Justice Ginsburg and three other Justices, however, concluded that the original

359. *See, e.g.*, Atl. Cleaners & Dyers v. United States, 286 U.S. 427, 433–34 (1932) (explaining by way of example that "[i]n the regulation of foreign commerce an embargo is admissible; but it reasonably cannot be thought that, in respect of legitimate and unobjectionable articles, an embargo would be admissible as a regulation of interstate commerce").

360. Balkin, *supra* note 52, at 14 (emphasis in original).

361. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2589 (explaining that to ignore the distinction between regulating and compelling commerce would undermine the principle that the Federal Government is a government of limited and enumerated powers).

362. *Id.* at 2586.

363. *Id.* Roberts explained: "Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority." *Id.* at 2587. Roberts, however, found the individual mandate to be constitutional under the Taxing Clause. *Id.* at 2593–600.

meaning of "to regulate" meant "to require action."[364] and thus found that the individual mandate was constitutional under the Interstate Commerce Clause. Prior to *Sebelius*, most scholars agreed that the phrase "to regulate" meant "prescribing rules for."[365]

"[L]ike many constitutional terms, the meaning of 'commerce' is neither obvious nor uncontested."[366] Instead of explicitly defining the term "commerce," the Court tends to rely on its intuition that an activity is or is not "commercial" or "economic" in nature.[367] The meaning of "commerce" has been debated by many renowned scholars. As a matter of quick summary, there are generally three views. One view interprets the original meaning of commerce narrowly to include only trade activity.[368] The second view (broad with some limits) understands "'commerce' as including only *commercial* interactions—voluntary sales of products and services and related activities intended for the marketplace, such as the manufacturing of goods for sale, banking, transportation for a fee, and paid labor."[369] The third view broadly interprets the meaning of commerce to be "intercourse" which includes both economic and social interactions.[370]

The purpose of this Article is not to contribute to the debate over the meaning of "to regulate Commerce." Rather, this Article, simply takes the position that however the Court defines "to regulate Commerce," the Court should use the same definition consistently among all three

364. *Id.* at 2621 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

365. Pushaw, *Obamacare*, *supra* note 52, at 1708 (citing Balkin, *supra* note 52, at 19); Robert J. Pushaw, Jr. & Grant S. Nelson, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 NW. U. L. REV. 695, 708 (2002) (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 190 (1824)). *But see* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 139–46 (2001) (arguing that, depending on the "subject of the regulation," "to regulate" may not encompass "prohibitions").

366. United States v. Patton, 451 F.3d 615, 624 (10th Cir. 2006) (citing to Nelson & Pushaw, *First Principles*, *supra* note 54, at 9–42, 107–10).

367. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 613 (2000) ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."); Pushaw, *Counter-Revolution*, *supra* note 74, at 881 (explaining that in *Lopez* and *Morrison* "the Court announced that Congress can regulate only 'commercial' or 'economic' activity . . . [but] the majority refused to define these words").

368. *See, e.g.*, Barnett, *supra* note 366, at 104 (arguing original intent of Commerce Clause was to regulate only interstate trade and transportation of goods); Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 861–62 (2002).

369. Pushaw, *Obamacare*, *supra* note 52, at 1706 (citing Nelson & Pushaw, *First Principles*, *supra* note 54, at 9–42).

370. *See* AMAR, *supra* note 52, at 107–08; Balkin, *supra* note 50, at 5–6, 15–29.

categories.[371] The real difference among the legal framework of three clauses is reflected in the phrases that follow "to regulate commerce." Thus, as discussed next, it is imperative to consider what the phrase "with foreign Nations" means.

### 2. "with foreign Nations"

#### a. Not "among" or "within"

Before analyzing what "with foreign Nations" might mean, it is important to point out what it does not mean. First, the phrase is "with," not "among."[372] The word "among," as in the Interstate Commerce Clause ("among the several States") embodies the notion of "activities that 'generate collective action problems that concern more than one state."[373] Thus, as the Court has held, Congress can regulate commerce among states (i.e., inter-state) or conduct wholly intrastate so long as it substantially affects interstate commerce.[374] If the Foreign Commerce Clause used the language, "*among* the foreign Nations," such power would be unenforceable because it would suggest that Congress could regulate conduct solely between foreign nations. For example, if the phrasing were "among," Congress could conceivably pass a law requiring Mexico to enact an embargo of Cuban cigars. Without Mexico's consent (for example, a treaty), such congressional action would create foreign sovereignty problems.[375]

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371. *See* Balkin, *supra* note 52, at 13 (explaining that "[w]hatever 'regulate' and 'commerce' refer to, there is a strong argument that they have the same semantic meaning with the respect to all three," including the "[s]tates, foreign nations, and Indian tribes").

372. The Court has noted the differences in the meaning of "with" and "among" in Indian Commerce Clause precedent, and, thus, likewise should recognize a difference where the Foreign Commerce Clause is concerned. *See, e.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) ("[T]he fact that States and tribes have concurrent jurisdiction over the same territory makes it inappropriate to apply Commerce Clause doctrine developed in the context of commerce 'among' States with mutually exclusive territorial jurisdiction to trade 'with' Indian tribes.").

373. Balkin, *Commerce*, *supra* note 52, at 6); *see also* United States v. Lopez, 514 U.S. 549, 553 (1995) ("Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one . . . .") (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194 (1824)).

374. *See* Balkin, *Commerce*, *supra* note 52, at 30 (explaining "Congress can regulate interactions that extend in their *operation* beyond the bounds of a particular state, and interactions that extend in their *effects* beyond the bounds of a particular state"); *see also supra* Part II.A. (describing the current legal framework of the Interstate Commerce Clause, including the substantial effects test and the use of the Necessary and Proper Clause to enact comprehensive regulatory schemes that may impact wholly intrastate activity as in Gonzales v. Raich, 545 U.S. 1, 22 (2005)).

375. *See supra* Part III.B (discussing national sovereignty as an underlying principle of the Foreign Commerce Clause); *supra* Part I.A (discussing the applicability of international law jurisdictional principles to U.S. laws with extraterritorial application).

Second, the phrase is "with," not "within." If the Foreign Commerce Clause were phrased, "*within* foreign Nations," foreign sovereignty concerns would again arise because it would suggest Congress could regulate non-U.S. citizens' conduct within other nations. A U.S. law that prohibits a Japanese citizen within Japan (or within any other foreign nation) from smoking Cuban cigars would not be enforceable because it would encroach on the other nation's sovereignty and violate international law jurisdictional principles.[376] As the Court has explained: "Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory *unless in respect of our own citizens*."[377] Thus, the phraseology of the Foreign Commerce Clause suggests that there are some limits to Congress's power; namely that Congress has no sovereignty jurisdiction over conduct either *among* foreign nations, or *within* a foreign nation concerning the conduct of non-U.S. citizens.[378]

b. "With" Defined as "means" or "connection"

What does the term "with" entail?[379] Looking at dictionaries contemporary to the Constitutional Convention, two notable definitions emerge. "With" is defined as "noting the means" or "noting connection."[380] The first definition, "means," suggests that under the Foreign Commerce Clause, Congress could enact laws that concern travel by means of foreign commerce, such as traveling by plane. This "means" concept potentially applies to § 2423(b) of the PROTECT Act,

376. *See supra* Part I.A.

377. United States v. Curtiss-Wright Exp., 299 U.S. 304, 318 (1936) (emphasis added).

378. Colangelo concludes that the "difference between the words 'among' in the Interstate Commerce Clause and 'with' in the Foreign Commerce Clause indicates that Congress has no more, and in some respects may have less, power to regulate commerce inside foreign nations under the Foreign Commerce Clause than inside the states under the Interstate Commerce Clause." Colangelo, *supra* note 39, at 972. In this limited way the Foreign Commerce Clause is narrower than the Interstate Commerce Clause in that Congress cannot regulate inside a foreign nation, but can regulate inside of a state. However, this analysis misses the main issue confronting the courts because it does not recognize that Congress's foreign commerce power is broad (ever broader than under the Interstate Commerce Clause) when it comes to regulating *U.S. citizens' conduct* in other countries. *See supra* Part II.B.2 (discussing circuit splits on this issue).

379. As a matter of terminology, the word "with" also appears in the Indian Commerce Clause ("with the Indian Tribes"). The significance of this shared term reflects that Indian tribes, like foreign nations, have a type of relationship different than the states. Beyond this reflection, given that Indian tribes are unique "dependent sovereigns," the shared "with" cannot signify anything more. *See supra* Part II.C. (discussing the uniqueness of the Indian Commerce Clause as identified in such cases as United States v. Lara, 514 U.S. 193, 203 (2004)).

380. SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1768) (unpaginated), *available at* http://books.google.com/books?id=bXsCAAAAQAAJ&pg=PP943#v=onepage&q&f =false.

which regulates the conduct of a U.S. citizen who enters foreign commerce (like catching a plane) with the *intent* of molesting children abroad.[381] By forming the intent to molest before catching the plane, the perpetrator intended to use the means of foreign commerce for immoral uses (this is different than § 2423(c) of the PROTECT Act which removes the intent requirement).[382] Such an analysis is analogous to Interstate Commerce Clause precedent that allows Congress to regulate the immoral use of the channels or instrumentalities of commerce,[383] which, as Justice Scalia has noted, is the very "ingredient" of commerce.[384]

If the Foreign Commerce Clause allows Congress to regulate the "means" of foreign commerce, does that imply that Congress could regulate *all* means of international travel, including travel by non-U.S. citizens without any connection to the United States (such as an Italian citizen flying on an Italian owned aircraft to Spain)? Such vast power not only violates the notion that Congress's foreign commerce power is limited, but also encroaches on foreign sovereignty principles.[385] This is where the second definition, "connection," becomes important.[386]

"Connection" signifies that whatever conduct Congress is attempting to regulate under the Foreign Commerce Clause should link the foreign nation and the United States. In thinking about what this link might entail, one source to consider are those cases where courts have dealt with statutory challenges to the application of laws with extraterritorial reach. In these cases, courts have to determine, as a matter of statutory interpretation, whether the jurisdictional scope of a federal statue applies extraterritorially. Although these cases discuss "a canon of construction . . . about a statute's meaning, rather than a limit upon Congress's power to legislate [under the Foreign Commerce

381. 18 U.S.C. § 2423(b) (2006).

382. 18 U.S.C. § 2423(c) (2006).

383. *See, e.g.*, Hoke v. United States, 227 U.S. 308, 320–26 (1913) (upholding, under the Interstate Commerce Clause, the constitutional validity of the Mann Act, 18 U.S.C. §§ 2421–24, a federal statute regulating interstate travel for the improper purposes of prostitution).

384. Gonzales v. Raich, 545 U.S. 1, 34 (2005) (Scalia, J., concurring).

385. *See supra* Parts III.A and III.B.

386. This fear of unreasonable exercise of power is precisely why the Ninth Circuit's "tenable nexus" test is problematic. *See, e.g.*, *United States v. Clark*, 435 F.3d 1100, 1114 (9th Cir. 2006). In *Clark*, the Ninth Circuit correctly concluded that the Foreign Commerce Clause should have a distinct test, separate from the Interstate Commerce Clause, but the test's only requirement is that the regulation has a "tenable nexus" to foreign commerce. *Id.*; *see also supra* Part II.B (discussing the "tenable nexus" test). This nebulous standard could have unreasonable results such as allowing Congress to regulate *all* airspace (even an Italian flying on an Italian plane headed to Spain), since such travel has a tenable nexus to foreign commerce. *See Clark*, 435 F.3d at 1117–20 (Ferguson, J., dissenting). This is why the second factor, "connection" to the United States, is so important. It puts reasonable limits on the foreign commerce power so that Congress can only regulate commerce which has some link to the United States.

Clause],"[387] such cases are instructive because they give guidance on what factors courts consider when confronted with laws that apply abroad. Four factors emerge from these cases that help inform what a "connection" to a foreign nation may entail. These four factors are: (1) impact on the United States; (2) territorial nexus; (3) congressional intent; and (4) respect for international norms. This proposed legal framework of the Foreign Commerce Clause does not require that each of these factors be present. Rather, courts should consider the totality of circumstances in light of these four factors when trying to determine if a federal law regulates commerce that has a "connection" between the foreign nation and the United States. Each factor is discussed in turn below.

First, courts have interpreted laws to have extraterritorial application where the law regulates conduct that has some impact on the United States. For example, in *Steele v. Bulova Watch Company*,[388] the Court interpreted the Lanham Act[389] as having extraterritorial application to a civil claim against a U.S. citizen who, while in Mexico, deceptively used a U.S. company's trademark.[390] In finding that the language of the statute allowed for extraterritorial application, the Court explained that the defendant's acts "were not confined within the territorial limits of a foreign nation" but rather "reflect[ed] adversely" on an American company's "trade reputation in markets cultivated by advertising here as well as abroad."[391] Thus, where a U.S. citizen's conduct affects the United States, courts have interpreted statutes to have extraterritorial reach. The Court in dicta has used similar language when talking about the foreign commerce power, explaining that Congress can make laws with extraterritorial reach "where the United States interests are affected."[392] Under the Foreign Commerce Clause, Congress therefore should be limited to passing laws that regulate conduct abroad only if that conduct somehow affects the United States. This factor makes sense because it would prevent, for example, Congress from regulating the conduct of an Italian traveling to Spain on an Italian airline because it has no effect on the United States even though it involves a means of foreign commerce.

387. Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869, 2877 (2010).

388. 344 U.S. 280 (1952).

389. 15 U.S.C § 1051 (2006).

390. *Bulova Watch Co.*, 344 U.S. at 286–89.

391. *Id.* at 286.

392. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813–14 (1993) (Scalia, J., dissenting on other grounds) (citations omitted). *See also, e.g.*, Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1292 (3d Cir. 1979) (explaining that, as a matter of statutory interpretation, the "practices of an American citizen abroad" having an impact "on American foreign commerce are subject to the Sherman Act").

Second, in these statutory interpretation cases, some type of territorial nexus[393] is often required because without it, courts are less likely to find the extraterritorial reach of a law valid. For example, in *United States v. Weingarten*, a U.S. citizen was convicted of violating the PROTECT Act for traveling from Belgium to Israel where he molested a child.[394] The court found the conviction invalid, explaining that, as a matter of statutory interpretation, the phrase, "travel[] in Foreign Commerce" in the PROTECT Act did "not criminalize travel occurring wholly between two foreign countries and *without any territorial nexus* to the United States."[395] Applying this same principle, another district court found no extraterritorial jurisdiction of the federal kidnapping law[396] to a kidnapping that had no territorial link to the United States, but took place on the high seas and in Cuba.[397] In dicta, at least one court has suggested this principle also limits power under the Foreign Commerce Clause. In *United States v. Yunis*, where a foreign defendant was charged with destruction of a foreign aircraft, [398] the court in dicta explained that the foreign commerce power did not give Congress the "authority to regulate global air commerce . . . which has no *connection* to the United States."[399] A territorial nexus factor for a Foreign Commerce Clause analysis makes sense because anything less would subject "almost every aircraft," or any means of foreign travel, even "operating exclusively overseas," to "regulation by the United States."[400]

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393. "*Territorial* nexus" is different than the Ninth Circuit's "*tenable* nexus" test. The Ninth Circuit's test requires that the regulated conduct simply has a nexus to foreign commerce, *United States v. Clark*, 435 F.3d 1100, 1114 (9th Cir. 2006), hence the reason the dissent was strongly opposed to the test. *Id.* at 1117–20 (Ferguson, J., dissenting). Territorial nexus, on the other hand, suggests that the conduct has to have some connection to the United States itself, not just foreign commerce.

394. United States v. Weingarten, 632 F.3d 60, 61 (2d Cir. 2011).

395. *Id.* at 70–71 (emphasis added).

396. 18 U.S.C. § 1201 (2006) (prohibiting kidnapping in "foreign commerce").

397. United States v. McRary, 665 F.2d 674, 678 (5th Cir. 1982) (holding that "the foreign commerce jurisdictional basis [of the federal kidnapping statute] mandates that the kidnapping take place in the United States and that the victim be subsequently transported to a foreign State," and, therefore, kidnapping that took place on high seas with subsequent transportation to Cuba was not subject to foreign commerce jurisdiction); *see also* United States v. Yousef, 327 F.3d 56, 111 (2d Cir. 2003) ("[I]n order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair.") (quoting United States v. Davis, 905 F.2d 245, 248–49 (9th Cir. 1990)).

398. 681 F. Supp. 896 (D.D.C. 1988).

399. *Id.* at 907 n.24 (emphasis added). It is important to note that *Yunis* did not directly involve a Foreign Commerce Clause issue, but rather the statutory interpretation of the Federal Aviation Act of 1958, 18 U.S.C. § 31. *See* Yunis, 681 F. Supp. at 907–08.

400. *Id.* at 908.

The last two factors are encompassed in two presumptions that courts use when determining whether a law, as a matter of statutory interpretation, has extraterritorial reach. The first "presumption [is] that Congress does not intend a statute to apply to conduct outside of the territorial jurisdiction of the United States [unless Congress] clearly expresses its intent to do so."[401] Thus, just as in Interstate Commerce Clause jurisprudence, when analyzing the constitutional validity of a statute under the Foreign Commerce Clause, the Court should consider congressional intent.[402] While congressional intent alone would not dictate proper use of the foreign commerce power,[403] if Congress includes an express "jurisdictional element"[404] that establishes "its connection" [405] to foreign commerce, then the courts should consider this intent. Interestingly, only about half of the laws with extraterritorial reach have this jurisdictional hook.[406] If Congress is using its foreign commerce power, it would be helpful if it made its intent clear.

Finally, the second presumption in statutory interpretation cases is that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[407] Thus, while Congress's power to enact statutes is not bound by international law,[408]

401. *Yousef*, 327 F.3d at 86; *see also* Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949). The requirement that the statute express its extraterritorial jurisdiction does not necessarily require a "clear statement" that the "law applies abroad;" rather, in searching for the statutory meaning the "context can be consulted as well." Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869, 2883 (2010). If the statute is criminal, and congressional intent is silent as to its extraterritorial application, then it is "inferred from the nature of the offense." United States v. Bowman, 260 U.S. 94, 98 (1922) (explaining that the presumption against extraterritorial application does not apply to those "criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction"); s*ee also, e.g.*, *Yousef*, 327 F.3d at 86 (relying on *Bowman* to find that a statute prohibiting attempts to damage or destroy aircraft was intended by Congress to apply extraterritorially); United States v. Plummer, 221 F.3d 1298, 1304–06 (11th Cir. 2000) (relying on *Bowman* to find that the attempt provision statute which criminalized the smuggling of goods into the United States applied extraterritorially).

402. *See supra* Part II.A (discussing how the Court factors in congressional intent when considering Congress's power under the Interstate Commerce Clause).

403. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 614 (2000) (finding a federal statute unconstitional under the Interstate Commerce Clause even though Congress stated its intent was to use its interstate commerce power).

404. United States v. Lopez, 514 U.S. 549, 562–63 (1995); *see also supra* Part II.A.4. (discussing the Court's consideration of congressional intent in Interstate Commerce Clause cases).

405. Gonzales v. Raich, 545 U.S. 1, 44 (2005) (O'Connor, J., dissenting) (explaining the *Lopez* decision).

406. *See infra* Appendix A (identifying statutes with extraterritorial application which have an express jurisdictional hook to the foreign commerce power).

407. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

408. United States v. Yousef, 327 F.3d 56, 86 (2d Cir. 2003) (explaining that "Congress is not bound by international law" and may, if it chooses, legislate with extraterritorial application "in excess of the limits posed by international law") (quoting United States v. Pinto-Mejia, 720

the Court assumes Congress did not intend to violate any international legal norms. Extending this presumption to the Foreign Commerce Clause, laws with extraterritorial application should, as discussed above, be respectful of international norms such as foreign sovereignty. This means that Congress presumptively would not pass laws that regulate the conduct of non-U.S. citizens in foreign countries.[409] On the other hand, it also means that under the international legal theory of nationality jurisdiction, Congress could regulate the conduct of U.S. citizens in foreign countries.[410]

This proposed legal framework, which embodies a "means" and "connection" factor test, attempts to take into consideration the history, jurisprudence, and text of the Foreign Commerce Clause. This framework reflects Congress's broad foreign commerce power limited by an understanding of the unique relationship the United States shares with foreign nations. Those limits would allow Congress "to regulate commerce" under the Foreign Commerce Clause that has both some effect on the United States and a territorial nexus to the United States. Congressional intent would also be considered. Finally, it would be presumed that Congress would use its foreign commerce power to enact laws respectful of international legal norms (such as recognition of foreign sovereignty and of the nationality jurisdictional principle). These factors would be considered as a whole to determine if Congress is acting within its power under the Foreign Commerce Clause.

### D. *Example Applications*

Because this proposed legal framework for the Foreign Commerce Clause is a factors test, whether or not a law would be constitutionally valid under it is a fact-specific inquiry. To give some context to the legal framework, however, it will be applied to the four categories of hypotheticals set forth at the beginning of this Article.[411]

*Hypothetical Category #1: Statutes regulating conduct in the United States.* First, under the proposed legal framework, would a law creating a U.S. embargo of Cuban cigars survive under the Foreign Commerce Clause? This law would squarely pass constitutional muster under this legal framework. Even under the strictest definition of "to regulate commerce," trade would be covered.[412] Historically, Congress's broad foreign commerce power was meant to allow the United States to speak

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F.2d 248, 259 (2d Cir. 1983), *opinion modified on denial of reh'g*, 728 F.2d 142 (2d Cir. 1984).

409. *See supra* Part III.B (discussing foreign sovereignty concerns).

410. *See supra* Part I.A (discussing the nationality principle).

411. *See supra* Introduction (setting forth a chart of four categories of hypotheticals).

412. *See supra* notes 367–71 and accompanying text (discussing the scholarly debate on the meaning of "commerce"). The narrowest definition of "commerce" is defined as trade, which likely encompasses embargos. *See, e.g.*, Barnett, *supra* note 366, at 104, 112.

with one voice with foreign nations.[413] A federal embargo fully embraces this notion. Textually, this embargo also reflects a clear connection to the United States in that it deals with trade that affects the United States. There is also a territorial nexus since it regulates foreign commerce that takes place inside the United States. Finally, enacting an embargo is not a violation of any international norm. Thus, under the proposed "connection" factor test, Congress would clearly have the power to enact such an embargo.

*Hypothetical Category #2: Extraterritorial statutes regulating conduct of foreign nations.* If the first hypothetical was slightly tweaked, and the law required Mexico to enact an embargo on Cuban cigars, problems would arise. Although such a law arguably still allows the United States to speak with one voice in foreign matters, the law would have much less of a connection to the United States. It is questionable whether such a law would regulate any conduct that affects the United States and there is no territorial nexus to the United States (since the embargo involves Cuba and Mexico). Furthermore, absent Mexico's consent, such a law would encroach on Mexico's sovereignty and, thus, would not be respectful of international norms. Since such a law fails to meet many of the factors, it would be an invalid exercise of the foreign commerce power.

*Hypothetical Category #3: Extraterritorial statutes regulating conduct of U.S. citizens in foreign nations.* The next set of hypotheticals is less clear because it involves the regulation of conduct of U.S. citizens who travel abroad. Under the proposed legal framework for the Foreign Commerce Clause, would the PROTECT Act, a law that criminalizes the conduct of U.S. citizens who travel abroad to molest children,[414] survive? A proper analysis requires an understanding of the legislative history of the law and also a careful breakdown of the statute. Legislative history shows that Congress enacted the PROTECT Act to combat "child sex tourism" in foreign countries.[415] Because of the ease of global buying and selling on the Internet, some authorities estimate that human trafficking is almost as lucrative as drug trafficking.[416] A fundamental reason that Congress enacted the PROTECT Act was to eliminate the profitability of child sex trafficking. In essence, the problem is supply and demand. For the most part, citizens of developed

413. *See supra* Part II.B (discussing the history of the Foreign Commerce Clause and the "one voice" test).

414. 18 U.S.C. § 2423 (2006).

415. 18 U.S.C. § 2423(c) (2006); H.R. REP. NO. 108–66, at 51 (2003) (Conf. Rep.).

416. *See What Is The Role Of Transnational Organised Crime Groups In Human Trafficking?*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, http://www.unodc.org/unodc/en/human-trafficking/faqs.html#what_is_the_role_of_transnational_organised_crime_groups_in_human_trafficking (last visited Mar. 15, 2013).

western countries, such as the United States and those in Europe, have the resources to fund the demand.[417] On the other hand, developing countries, like Cambodia, often supply the children. The reason developing countries are able to "meet the demand" is because they lack resources and they have unstable rule of law that leaves many children at risk of becoming victims of child sex trafficking.[418] Congress enacted the PROTECT Act in an attempt to shift the cost of prosecution from a supply country like Cambodia to a demand country like the United States.[419]

Given this legislative purpose, the PROTECT Act criminalizes both commercial and noncommercial sex acts with children.[420] Thus, the first constitutional hurdle is whether the law regulates "commerce." Because a commercial sex act is economic in nature, it would likely be considered "commerce" under the definitions of commerce that encompass economic activity.[421] The part of the statute that covers noncommercial sex acts poses more of a problem. Since such conduct is noneconomic in nature, then it would probably only be considered "commerce" under the broadest definition, which defines commerce as "intercourse."[422]

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417. *Which Countries Are Affected By Human Trafficking?*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, http://www.unodc.org/unodc/en/human-trafficking/faqs.html#Which_countries_are_affected_by_human_trafficking (last visited Mar. 15, 2013).

418. *Id.*

419. *See* 18 U.S.C. § 2423(a) (2006) (stating that "[a] person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life").

420. 18 U.S.C. § 2423(f) (defining the term "illicit sexual conduct" as "(1) a sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States; or (2) any commercial sex act (as defined in section 1591) with a person under 18 years of age."); *see also supra* notes 240–43 and accompanying text (discussing the PROTECT Act).

421. *See* AMAR, *supra* note 52, at 107–08; Pushaw, *Obamacare*, *supra* note 52, at 1703; *see also supra* Part III.C.1 (discussing the scholarly debate on the meaning of "commerce").

422. AMAR, *supra* note 50, at 107–08. Perhaps it could be argued that even under a narrower definition of commerce, a noncommercial sex act on a child is economic in nature. Legislative history shows that the PROTECT Act was enacted to combat the supply-and-demand phenomenon of child sex trafficking. *See supra* notes 243 & 416 and accompany text (discussing the legislative history of the PROTECT Act). Noncommercial sex acts on children impact this supply-and-demand phenomenon as much as commercial sex acts do. A non-commercial sex act on a child signals that there is a demand for such things, which in turn might create more supply of commercial sex acts. Arguably then, even a noncommercial sex act with a child is economic in nature since it impacts this supply-and-demand economic theory. Another approach to this issue might be a *Raich* type of analysis. *See* Gonzales v. Raich, 545 U.S. 1 (2005). In *Raich*, the Court upheld the federal regulation of drugs (even though it encompassed

Assuming the PROTECT Act regulates commerce, the next hurdle is whether the conduct is "with foreign Nations." As discussed above, the part of the statute that makes it a crime for a U.S. citizen to enter foreign commerce with the intent to molest a child abroad[423] is covered under the notion that Congress can regulate the improper use of the "means" of foreign commerce.[424] The harder analysis is presented by the part of the PROTECT Act which simply criminalizes entering into foreign commerce and later molesting a child.[425] This is where the factors test becomes fact specific. Engaging in child molestation abroad arguably affects the United States given that the legislative history sets forth a supply-and-demand justification for the law.[426] The statute also has a jurisdictional hook to foreign commerce.[427] Moreover, the law does not violate any international norms since the nationality principle allows for extraterritorial application of laws without encroaching on another country's sovereignty.[428] Given the specific facts of any particular case, however, there might be an issue of whether there is a territorial nexus. It would be harder to establish a territorial nexus if a U.S. citizen lived abroad for years without recent travel to or from the United States.[429] Thus, while some factors are present, each scenario would have to be considered on a case-by-case basis to determine if Congress is acting

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intra-state activity) under the Interstate Commerce Clause because the law as a whole was part of a "general regulatory" scheme which was allowed under the Necessary and Proper Clause. *Id.* at 17; *see also supra* notes 119–23 and accompanying text (discussing *Raich*). Likewise, if Congress is allowed to regulate commercial sex acts with a child, then it may be necessary and proper for Congress to regulate noncommercial sex acts with a child (even if it is not economic in nature) as part of a "general regulatory" scheme.

423. 18 U.S.C. § 2423(b) (stating that "[a] person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.").

425. *See supra* Part III.C.2.b (discussing the "means" of foreign commerce).

425. 18 U.S.C. § 2423(c) (stating that "[a]ny United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both."); *see also supra* notes 240–43 and accompanying text (discussing the PROTECT Act).

426. *See supra* notes 243 & 416 and accompanying text (discussing the legislative history of the PROTECT Act).

427. 18 U.S.C. § 2423(a), (b), (c) (explaining that the prohibited conduct has to occur in "foreign commerce").

428. *See supra* Part I.A (discussing the nationality principle of jurisdiction under international law).

429. *See, e.g.*, United States v. Weingarten, 632 F.3d 60, 70–71 (2d Cir. 2011) (finding, as a matter of statutory interpretation, a conviction under the PROTECT Act invalid for acts committed by a U.S. citizen who traveled between two foreign countries).

within its power under the Foreign Commerce Clause.[430]

Indeed, any federal law regulating the conduct of U.S. citizens abroad would have to undergo a similar factor analysis. Thus, for those hypotheticals where U.S. citizens rob banks or litter in other countries, even if such conduct constitutes "commerce" (which would vary depending on which definition is applied), the lingering issue would be whether their conduct abroad was somehow "connected" to the United States. As listed in Appendix A, a majority of the laws with extraterritorial application regulate the conduct of U.S. citizens abroad. The proposed legal framework for the Foreign Commerce Clause set forth in this Article could be comprehensively applied to each of these laws on a case-by-case basis to determine whether such laws are a constitutional exercise of Congress's foreign commerce power.[431]

*Hypothetical Category #4: Extraterritorial statutes regulating conduct of non-U.S. citizens in foreign nations.* Finally, if Congress attempted to pass a law like the PROTECT Act governing the conduct of a non-U.S. citizen in another country, the law would be invalid under the Foreign Commerce Clause. The conduct of a non-U.S. citizen abroad has no effect on the United States; it has no territorial nexus to the United States; and such regulation would violate international norms since it would encroach on the other country's sovereignty.[432] Thus, such a law would not be constitutional under the Foreign Commerce Clause.

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430. Some scholars have argued that the PROTECT Act would be unconstitutional under the Foreign Commerce Clause, but constitutional under the Treaty Clause and the Necessary and Proper Clause. *See, e.g.*, *Ninth Circuit Holds That Congress Can Regulate Sex Crimes Committed by U.S. Citizens Abroad*—United States v. Clark*, 435 F.3d 1100 (9th Cir. 2006)*, 119 HARV. L. REV. 2612, 2618–19 (2006) (arguing that the PROTECT Act is constitutional under the Necessary and Proper Clause where the United States and another nation are both signatories of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography). Limiting the constitutionality of the PROTECT Act, and similar laws, in this way leads to inconsistent results. For example, under this analysis, a U.S. citizen who molests a child in Cambodia would be prosecuted because Cambodia signed the relevant treaty, but the same conduct would not be illegal in Russia, because Russia has not ratified the relevant portion of the treaty. *See* United Nations Treaty Collection, Status, *available at* http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en (showing that Russia has not ratified the Optional Protocol to the Convention on the Rights of the Child).

431. There may be other constitutional provisions that give Congress the power to enact the laws listed in Appendix A. *See supra* Part I.B. (listing other constitutional provisions that may allow Congress to enact laws with extraterritorial application). Such analysis is beyond the scope of this Article.

432. *See supra* Parts I.B and III.C.

By way of quick summary, the table below sets forth the possible outcomes of the hypothetical laws identified in the Introduction:

| | ***Conduct by a Nation*** | ***Conduct by an Individual in a Foreign Nation*** |
|---|---|---|
| ***U.S. Actor*** | **(1) Statutes regulating conduct in the United States**<br>*Hypo: Under the Foreign Commerce Clause, can Congress enact an embargo of Cuban cigars?*<br>***Answer:*** *Yes, assuming the conduct is commerce, because it regulates conduct that has a connection between the United States and the foreign nation.* | **(3) Extraterritorial statutes regulating conduct of U.S. citizens in foreign nations**<br>*Hypo: Under the Foreign Commerce Clause, can Congress enact a law that subjects U.S. citizens to criminal prosecution if they molest children in Cambodia?*<br>•*Or if they rob a bank in Spain?*<br>•*Or if they litter in France?*<br>***Answer:*** *It depends.*[433] *Even assuming the conduct is commerce, each law would have to be taken on a case-by-case basis to determine if there was a "connection" between the United States and the foreign nation.*[434] |
| ***Non-U.S. Actor*** | **(2) Extraterritorial statutes regulating conduct of foreign nations**<br>*Hypo: Under the Foreign Commerce Clause, can Congress pass a law requiring Mexico to enact an embargo of Cuban cigars?*<br>***Answer:*** *No, even if the conduct is commerce, because there is no impact on the United States, there is no territorial nexus, and such a law would violate the notion of foreign sovereignty, there would be no connection between the United States and the foreign nation.* | **(4) Extraterritorial statutes regulating conduct of non-U.S. citizens in foreign nations**<br>*Hypo: Under the Foreign Commerce Clause, can Congress pass a law prohibiting a Cambodian citizen from molesting a child in Cambodia?*<br>***Answer:*** *No—same answer as Category #2.* |

433. Category three encompasses many of current federal laws with extraterritorial application. *See infra* Appendix A to this Article.

434. *See supra* Part III.C. (discussing the factors to consider when determining if a federal law has a "connection" to foreign commerce).

## CONCLUSION

This Article has set forth a comprehensive legal framework for the Foreign Commerce Clause that considers the history, jurisprudence, and text of the constitutional provision. Given that there are already hundreds of laws with extraterritorial application[435] and that society is becoming increasingly global, Congress's foreign commerce power may become as prominent an issue as Congress's interstate commerce power. Simply superimposing the legal framework of the Interstate Commerce Clause (or the Indian Commerce Clause) onto the Foreign Commerce Clause fails to fully consider the unique history and text of the Foreign Commerce Clause and the unique relationship between the United States and foreign nations. Nevertheless, that is what a majority of lower courts have done.[436] On the other hand, those lower courts that have adopted a distinct Foreign Commerce Clause test have used language that is seemingly limitless.[437] The U.S. Supreme Court has yet to articulate a test. The framework proposed here sets forth factors that allow for broad foreign commerce power but with some practical limits. Such limits are important, particularly when federal laws regulate the conduct of U.S. citizens abroad.

435. *See infra* Appendix A.
436. *See supra* Part II.B.
437. *See id.*

# APPENDIX A

## CHART OF U.S. LAWS WITH POSSIBLE EXTRATERRITORIAL APPLICATION

## (1) Homicide, Kidnapping, Assault, Sex Crimes, Threats, and Terrorism

### Homicide

| CODE | CONDUCT REGULATED | *Does the statute explicitly state Congress is regulating foreign commerce or applying the statute extraterritorially?*[438] |
|---|---|---|
| 18 U.S.C. § 351 | Congressional, Cabinet, and Supreme Court assassination, kidnapping, and assault | Yes—Extraterritorial reach |
| 18 U.S.C. § 1119 | U.S. citizen murdering another U.S. citizen in a foreign country | Yes—Extraterritorial reach |
| 18 U.S.C. §§ 32, 33, 37, 38, 43, 115(a)(1)(A-B), 175, 229, 794, 844(d,f,i), 930, 956, 1091, 1116, 1117, 1120, 1121(a), 1365, 1503, 1652, 1751, 1952, 1958, 1992, 2118, 2283, 2441 | Conduct involving homicide of victims such as federal employees, officials, federal witnesses, or internationally protected persons, and deaths resulting from mass or lethal weapons offenses | § 32—Foreign air commerce<br>§ 33—Foreign commerce<br>§ 38—Foreign commerce<br>§ 43—Foreign commerce<br>§ 175—Extraterritorial reach and foreign commerce<br>§ 844—Foreign commerce<br>§ 1365—Foreign commerce<br>§ 1751—Extraterritorial reach<br>§ 1952—Foreign commerce<br>§ 1958—Foreign commerce<br>§ 2118—Foreign commerce |
| 18 U.S.C. §§ 112, 115(a)(1)(A-B), 175, 831,[439] 871,[440] 875, 877-879, 1503, 1505, 1512,[441] 1513 | Conduct involving threats to destroy federal property or threats to murder, assault, or kidnap certain victims, including government officials and internationally protected persons | § 175—Extraterritorial reach<br>§ 875—Foreign commerce<br>§ 1512—Extraterritorial reach<br>§ 1513—Extraterritorial reach |

438. *See supra* Part III.C (discussing that one factor to consider in a Foreign Commerce Clause analysis is an explicit jurisdictional element expressing congressional intent to use foreign commerce power).

439. Proposed legislation.

440. Proposed legislation.

441. Proposed legislation.

**Kidnapping**

| CODE | CONDUCT REGULATED | *Does the statute explicitly state Congress is regulating foreign commerce or applying the statute extraterritorially?* |
|---|---|---|
| 18 U.S.C. §§ 115(a)(1)(A-B), 351, 956, 1201, 1203, 1204 | Conduct involving hostage taking, conspiracy to kidnap, or actual kidnapping of certain victims, including federal officials and children | § 351—Extraterritorial reach<br>§ 1201—Foreign commerce |
| 18 U.S.C. § 1204 | Parental kidnapping by keeping a child outside of the U.S. | Yes—Extraterritorial reach |
| 18 U.S.C. § 351 | Congressional, Cabinet, and Supreme Court assassination, kidnapping, and assault | Yes—Extraterritorial reach |
| 18 U.S.C. § 1201 | Kidnapping | Yes—Foreign commerce |
| 18 U.S.C. §§ 112, 115(a)(1)(A-B), 175, 831,[442] 871,[443] 875, 877-879, 1503, 1505, 1512,[444] 1513 | Conduct involving threats to destroy federal property or threats to murder, assault, or kidnap certain victims, including government officials and internationally protected persons | § 175—Extraterritorial reach<br>§ 875—Foreign commerce<br>§ 1512—Extraterritorial reach<br>§ 1513—Extraterritorial reach |

442. Proposed legislation.
443. Proposed legislation.
444. Proposed legislation.

## Assault

| CODE | CONDUCT REGULATED | *Does the statute explicitly state Congress is regulating foreign commerce or applying the statute extraterritorially?* |
|---|---|---|
| 7 U.S.C. §§ 60, 87b, 473c-1, 511i, 2146 | Assault or homicide of various federal farming programs | § 87b—Foreign commerce |
| 15 U.S.C. § 1825(a)(2)(C) | Assault or death of a federal officer under the Horse Protection Act | No |
| 16 U.S.C. §§ 1436, 1857, 1859 | Assaults on federal officials associated with marine conservation programs | § 1857—Foreign commerce |
| 18 U.S.C. § 175c | Purposeful transmission of small pox (Variola virus) | Yes—Regulation in or affecting foreign commerce |
| 18 U.S.C. § 351 | Congressional, Cabinet, and Supreme Court assassination, kidnapping, and assault | Yes—Extraterritorial reach |
| 18 U.S.C. §§ 37, 111, 112, 1091,[445] 1365, 1501-1503, 1512, 1513, 1655, 1751, 2114, 2194, 2261, 2262, 2332 | Conduct involving assaults on victims such as federal employees, officials, federal witnesses, or internationally protected persons | § 1751—Extraterritorial reach<br>§ 2262—Foreign commerce |
| 18 U.S.C. §§ 112, 115(a)(1)(A-B), 175, 831,[446] 871,[447] 875, 877-879, 1503, 1505, 1512,[448] 1513 | Conduct involving threats to destroy federal property or threats to murder, assault, or kidnap certain victims, including government officials and internationally protected persons | § 175—Extraterritorial reach<br>§ 875—Foreign commerce<br>§ 1512—Extraterritorial reach<br>§ 1513—Extraterritorial reach |
| 18 U.S.C. § 2332 | Assaulting Americans overseas | Yes[449] |
| 42 U.S.C. §§ 2000e-13, 2283 | Assaulting or causing the death of federal officials, namely EEOC personnel and nuclear inspectors | No |
| 49 U.S.C. §§ 46502,[450] 46504, 46506 | Assaulting or causing the death of someone in an act involving aircraft such as piracy | No |

445. Proposed legislation.

446. Proposed legislation.

447. Proposed legislation.

448. Proposed legislation.

449. *See, e.g.*, United States v. Alwan, 822 F. Supp. 2d 672, 676–77 (W.D. Ky. 2011) (interpreting the statute to have extraterritorial application to foreign countries under United States military occupation where there were conspiracies to commit murder of United States nationals in Iraq or to use weapons of mass destruction to murder United States nationals).

450. Proposed legislation.

## Sex Crimes

| CODE | CONDUCT REGULATED | *Does the statute explicitly state Congress is regulating foreign commerce or applying the statute extraterritorially?* |
|---|---|---|
| 18 U.S.C. § 3271 | Overseas human trafficking by those employed by U.S. | No |
| 18 U.S.C. § 2423 | American traveling overseas with intent to commit illegal sex act | Yes |
| 21 U.S.C. § 959 | Manufacture, distribution, or possession of illegal drugs with intent to import to U.S. | No |
| 18 U.S.C. § 2260 | Child pornography with intent to import into the U.S. | No |

## Threats

| CODE | CONDUCT REGULATED | *Does the statute explicitly state Congress is regulating foreign commerce or applying the statute extraterritorially?* |
|---|---|---|
| 18 U.S.C. § 877 | Mailing threatening communications from foreign country | Yes – Improper use of the channels of foreign mail system |
| 18 U.S.C. §§ 112, 115(a)(1)(A-B), 175, 831,[451] 871,[452] 875, 877-879, 1503, 1505, 1512,[453] 1513 | Conduct involving threats to destroy federal property or threats to murder, assault, or kidnap certain victims, including government officials and internationally protected persons | § 175—Extraterritorial reach<br>§ 875—Foreign commerce<br>§ 1512—Extraterritorial reach<br>§ 1513—Extraterritorial reach |
| 49 U.S.C. § 46507 | Threatening to attack an aircraft | No |

451. Proposed legislation.
452. Proposed legislation.
453. Proposed legislation.

**Terrorism**

| CODE | CONDUCT REGULATED | *Does the statute explicitly state Congress is regulating foreign commerce or applying the statute extraterritorially?* |
|---|---|---|
| 21 U.S.C. § 960A | Narco-terrorism | No |
| 18 U.S.C. § 2339D | Receipt of military training from a foreign terrorist organization | Yes—Extraterritorial reach |
| 18 U.S.C. § 2339B | Providing resources to designated terrorist organizations | Yes—Extraterritorial reach |
| 18 U.S.C. § 2332b | Terrorist acts transcending national boundaries | Yes—Extraterritorial reach |
| 18 U.S.C. § 831 | Actual or attempted possession, or conspiring to possess nuclear material | No |

## (2) Property Destruction

| CODE | CONDUCT REGULATED | *Does the statute explicitly state Congress is regulating foreign commerce or applying the statute extraterritorially?* |
|---|---|---|
| 18 U.S.C. §§ 32, 33, 37, 43, 115(a)(1)(A-B), 229, 331, 844(f,i), 956, 1030, 1361, 1362, 2071, 2153, 2155, 2332(a) | Conduct involving destruction of property, including aircraft, motor vehicles, international airports, and other federal property | § 32—Foreign air commerce<br>§ 33—Foreign commerce<br>§ 43—Foreign commerce<br>§ 844(i) —Foreign commerce<br>§ 1030—Foreign commerce |
| 18 U.S.C. §§ 112, 115(a)(1)(A-B), 175, 831,[454] 871,[455] 875, 877-879, 1503, 1505, 1512,[456] 1513 | Conduct involving threats to destroy federal property or threats to murder, assault, or kidnap certain victims, including government officials and internationally protected persons | § 175—Extraterritorial reach<br>§ 875—Foreign commerce<br>§ 1512—Extraterritorial reach<br>§ 1513—Extraterritorial reach |

454. Proposed legislation.
455. Proposed legislation.
456. Proposed legislation.

## (3) False Statements, Theft, Counterfeiting, and Fraud

### False Statements

| CODE | CONDUCT REGULATED | *Does the statute explicitly state Congress is regulating foreign commerce or applying the statute extraterritorially?* |
|---|---|---|
| 7 U.S.C. § 2024(b) | Fraudulently claiming food stamps | No |
| 8 U.S.C. § 1160(b)(7)(A) | Willfully falsifying information on an application for immigration status | No |
| 15 U.S.C. §§ 158, 645, 714m | False statements regarding federal administrations | No |
| 18 U.S.C. §§ 152, 287, 289, 541, 542, 550, 1001-1003, 1007, 1011, 1014, 1015, 1019, 1020, 1027, 1542, 1546, 1621, 1622 | Conduct involving false statements in situations such as banking, immigration services, and claims against the United States | No |

## Theft, Counterfeiting, and Money Crimes

| CODE | CONDUCT REGULATED | *Does the statute explicitly state Congress is regulating foreign commerce or applying the statute extraterritorially?* |
|---|---|---|
| 18 U.S.C. §§ 371, 641, 645, 648, 656-58, 831, 793-798, 1010, 1013, 1026, 1031, 1506, 1707, 1711, 2071, 2112, 2115 | Conduct involving theft, fraud, and embezzlement of property such as food stamps, federally insured credit unions and banks, and social security | No |
| 16 U.S.C. § 831t | Falsifying documents with intent to defraud a corporation under TVA | No |
| 18 U.S.C. §§ 470-474, 484, 486, 487, 490, 491, 493-501, 503, 505-510, 513, 514 | Conduct involving the counterfeiting of United States' federal property, such as coins, records, and stamps | § 470—Extraterritorial reach;<br>§ 513—Affecting foreign commerce<br>§ 514—Utilizing foreign commerce |
| 18 U.S.C. § 1956 | Money laundering | No |
| 18 U.S.C. § 1957 | Illegal money transactions | No |

**Fraud**

| CODE | CONDUCT REGULATED | *Does the statute explicitly state Congress is regulating foreign commerce or applying the statute extraterritorially?* |
|---|---|---|
| 18 U.S.C. § 1029(10) | Fraud in connection with access devices (*e.g.* cloning cell phone numbers) | Yes—foreign commerce |
| 45 U.S.C. § 359 | Fraudulently collecting railroad unemployment insurance | No |

## (4) Other Laws with Extraterritorial Reach

**Trade and Commerce**

| CODE | CONDUCT REGULATED | *Does the statute explicitly state Congress is regulating foreign commerce or applying the statute extraterritorially?* |
|---|---|---|
| Title 15 of the United State Code - Commerce and Trade | Conduct involving Commerce and Trade | 15 U.S.C. § 1127 defines the term "'commerce,' as used throughout the entire chapter, to mean *all* commerce which may lawfully be regulated by Congress."[457] |

457. 15 U.S.C. § 1127 (emphasis added).

**Miscellaneous**

| CODE | CONDUCT REGULATED | *Does the statute explicitly state Congress is regulating foreign commerce or applying the statute extraterritorially?* |
|---|---|---|
| 18 U.S.C. § 1512 | Tampering with federal witness or informant | Yes—Extraterritorial reach |
| 18 U.S.C. § 1513 | Retaliating against a federal witness or informant | No |
| 18 U.S.C. §§ 1831–1839 | Economic espionage, stealing trade secrets | No |
| 18 U.S.C. § 1992 | Attacks on transit systems involved in commerce | No |
| 18 U.S.C. §§ 2151–2157 | Sabotage | No |
| 18 U.S.C. § 2381 | Treason | No |